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COMPANY LAW

COMPANY LAW

BY

D. F. DE L'HOSTE RANKING, M.A., LL.D.

AND

ERNEST EVAN SPICER, F.C.A.

SEVENTH EDITION.

EDITED BY H. A. R. J. WILSON, F.C.A., F.S.A.A.

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PREFACE TO SEVENTH EDITION.

IN this edition the text has been brought up to date by the incorporation of cases decided and legislation enacted since the last edition appeared.

The opportunity has been taken also to recast the text, so that it now follows more closely the various stages in the development of a company's existence and affairs. This, together with the fact that the type has been entirely reset, should still further enhance the value of the book to students and others seeking a clear exposition of the law.

As in former editions, only the law relating to the formation and operation of companies is included. The provisions relating to winding-up are fully dealt with in Ranking, Spicer and Pegler's "Rights and Duties of Liquidators, Trustees and Receivers."

I wish to acknowledge, and to express my appreciation of, the assistance given in the preparation of this edition by Mr. S. SHAW, LL.B., of Gray's Inn.

H. A. R. J. WILSON.

16, COLEMAN STREET, E.C.2.

February, 1938.

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Abbreviation.	Reports.	Period.	Court.
A.C.	House of Lords and Privy Council Appeal Cases	1891—	House of Lords.
Acct. L. R.	Accountant Law Reports	1874—	All.
A.E.R.	All-England Reports	1936—	All.
App. Cas.	House of Lords and Privy Council Appeal Cases	1875—1891	House of Lords.
Atk.	Atkyns	1736—1754	Chancery.
Beav.	Beaven	1838—1866	Rolls Court.
Ch.	Chancery	1891—	Chancery.
Ch. D. }	Chancery Division	1875—1891	"
C. D. }	Common Pleas Division	1875—1891	Common Pleas.
C.P.D.	De Gex & Jones	1857—1862	Chancery Appeals
De G. & J.	De Gex, Jones & Smith	1862—1865	"
De G. J. & S.	De Gex, Macnaghten & Gordon	1851—1857	"
De G. M. & G.	Drewry	1852—1859	Vice Chancellor's.
Draw.	Drewry & Smale	1859—1865	"
Dr. & Sm.	Hare	1841—1853	"
Hare	Hurlstone & Coltman	1862—1865	Exchequer.
H. & C.	House of Lords Cases	1846—1866	House of Lords.
H.L.C.	Irish Cases		
Irish L.T.R.	King's Bench Division	1901—	King's Bench.
K.B.	Law Journal Chancery	1822—	Chancery.
L.J.Ch.	Law Journal, King's Bench	1900—	King's Bench.
L.J.K.B.	Law Journal, Queen's Bench	1837—1900	Queen's Bench.
L.J.Q.B.	Chancery	1865—1875	Chancery.
L.R.—Ch.	Common Pleas	1865—1875	Common Pleas.
L.R.—C.P.	Equity	1865—1875	Exchequer.
L.R.—Eq.	Exchequer	1876—1891	"
L.R.—Ex.	House of Lords	1865—1875	House of Lords.
L.R.—Ex.Div. }	Queen's Bench	1865—1875	Queen's Bench
L.R.—H.L.	Law Times	1846—	All.
L.R.—Q.B.	Megones Company Cases	1889—1891	Company Cases.
L.T.	Queen's Bench	1841—1852	Queen's Bench
Meg.	Queen's Bench Division	1875—1891	"
Q.B.	Scotch Cases		Court of Sessions.
Q.B.D.	Times Law Reports	1884—	All.
Sc., S.C., or Ct. Session }	Weekly Notes	1866—	"
T.L.R.	Weekly Reporter	1852—	"
W.N.			
W.R.			

COMPANY LAW.

SYNOPSIS OF CHAPTER I.

CORPORATIONS AND COMPANIES.

§ 1.—CORPORATIONS.

2.—MODES OF INCORPORATION.

- (a) By Charter from the Crown.
- (b) By Special Act of Parliament.
- (c) Under the Joint Stock Companies Act, 1844.
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5.—COMPANIES LIMITED BY GUARANTEE.

6.—UNLIMITED COMPANIES.

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8.—PRIVATE COMPANIES.

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CHAPTER I.

CORPORATIONS AND COMPANIES.

§ 1.—Corporations.

A CORPORATION is an association of individuals so constituted in law as to be invested with an independent collective personality. In the view of the law, the corporation is itself an entity or "person" whose rights and obligations are distinct from those of its constituent members; and it is endowed with a perpetual succession (*i.e.*, its existence persists irrespectively of variation in the composition of its membership) and a common seal whereby to identify its acts. Subject to qualifications which will appear later, it is capable of holding property, incurring debts, and suing or being sued in the same manner as an ordinary person.

A corporation is described as a CORPORATION SOLE, where there is only a single component member at any given time, the "association" being successive. Examples are to be found in perpetual offices such as the Crown, a Bishopric, the Rectorate of a Parish, and the Public Trusteeship.

A CORPORATION AGGREGATE, on the other hand, consists of a number of individuals contemporaneously associated so that in the eye of the law they form a single person, *e.g.*, limited companies, municipal corporations, etc. In the case of such bodies a writ

against the corporation may, in the absence of any statutory provision to the contrary, be served on the secretary, or other head officer, *e.g.*, in the case of a Local Authority, the Mayor, the Chairman of the Council, Town Clerk, Clerk, or Treasurer.

That a corporation is, in the conception of the law, an entity possessing no less than an ordinary individual a personality (as defined by its constitution) is strikingly illustrated by the case of *Willmott v. London Road Car Co., Ltd.* (1910), 1 Ch. 754. The lessee of certain lands had covenanted in the lease not to sublet without the plaintiff's written consent, which consent was not to be withheld "in respect of a respectable or responsible person." The lands were sublet to the London General Omnibus Co. Ltd., but the plaintiff refused his consent, and sought to recover the property on the ground that there had been a breach of covenant by the lessee. It was held that the word "person" in the covenant included a corporation, which was capable of being "a respectable and responsible person," and accordingly that the plaintiff's consent to the sublease had been unjustifiably withheld.

§ 2.—Modes of Incorporation.

The following are the methods by which Corporations are, or have been, capable of formation.

(a) By Charter from the Crown.

This method of incorporation specially applies where the corporation wishes to exercise some of the prerogatives of the Crown, such as the government of a territory, the raising of a military force, or matters of this kind. The right to exercise these powers is delegated by the terms of the charter, which is given under the Great Seal.

Such companies are termed "Chartered Companies," and it is by the means of such companies that trans-oceanic trade was developed, and new countries opened up during the 17th, 18th, and 19th centuries. Examples of such companies are the East India Company, 1664, and the British South Africa Company, 1889. The privileges, etc., of a City are also conferred by Royal Charter.

Royal Charters have been granted in other cases where the proposed company has sought powers to perform functions of a specialised nature, as for example in the case of the Institute of Chartered Accountants, the Chartered Institute of Secretaries, etc. The Charter confers specified rights and privileges. Any proposed alterations require the sanction of the Privy Council on behalf of the Crown.

The same power can be exercised by virtue of Letters Patent granted by the Crown; but these Letters do not incorporate the company. The company is formed by an agreement under seal, containing certain provisions specified by the Chartered Companies Act, 1837, and the privileges are then conferred by the Letters Patent, which are sealed with the Great Seal.

In the case of a company incorporated by Charter, the individual members have no liability for the debts of the corporation, beyond what is imposed by the terms of the Charter; whereas in the case of a patented company the members have full liability except so far as it is limited by the terms of the Letters Patent.

Patented Companies sue, or are sued, in the name of a public officer appointed for the purpose.

The principal difference between a chartered corporation and a company formed in any other manner is that the chartered corporation has the same

unqualified power as an individual of making contracts; the doctrine of *ultra vires* (see Chap. III) has no application to chartered companies. On the other hand, the powers of any statutory or registered company are confined to those conferred by the terms of its special Act or by its Memorandum of Association.

(b) By Special Act of Parliament.

This mode of incorporation is resorted to in the case of companies formed for the purpose of carrying out extensive operations of public utility, such as Railway, Canal and Tramway Companies, Gas, Water, Electric Lighting and Dock Companies. These statutory companies began to be created towards the end of the 18th century as a result of the demand for British goods, the increasing use of machinery, and the development of transport, and were formed by Act of Parliament as the only means of acquiring the necessary power to invade private rights, *e.g.*, the compulsory purchase of land.

Each company is governed by the terms of its special Act and by the general provisions of appropriate consolidating Acts, *e.g.*, the Companies Clauses Consolidation Act, 1845, the Railway Clauses Consolidation Act, 1845, the Lands Clauses Consolidation Act, 1845, the Gas Works Clauses Act, 1847, the Water Works Clauses Act, 1847, the Electric Lighting Act, 1882, etc.

Regulations which commonly apply to all statutory companies are, *e.g.*, that the liability of the members is limited, that all transfers of shares must be by deed and that twenty-one days' notice must be given of calls. In the case of the assets of a company being insufficient to satisfy any execution levied against the company, execution may, under order of the

Court, issue against any shareholder to the extent of any amount unpaid on his shares.

Fully paid shares may be consolidated into stock with the consent of three-fifths of the votes of those shareholders who are present in person or by proxy at a general meeting of which due notice has been given of the intention to propose the resolution. Writs, notices, etc., may be served at the general office of the company, or be given personally to the secretary, or if there be no secretary, then to any director.

Where the special Act entitles mortgagees to enforce payment by the appointment of a Receiver, the latter may be appointed in writing by two Justices to receive earnings of the company.

Such companies can only borrow money on mortgage or bond subject to the powers given by and restrictions contained in the special Act. The special Act commonly restricts the borrowing on mortgage or bond until some part of or the whole of the capital has been subscribed, and at least half has been paid up, and then usually only to the extent of one-third of their authorised capital. The provisions of the Companies Clauses Acts, 1845-1889 regulate the borrowing. A trading company has implied powers to borrow; and where the Act authorises works requiring expenditure, power to borrow may be implied (*Wenlock v. River Dee Co.* (1887), 36 Ch. D. 675).

Certain classes of statutory companies which are authorised to raise preference or debenture stock, may create and issue that stock so as to be redeemable on such terms and conditions as may be specified in a resolution of the company passed at a specially convened meeting. The company may call in and pay off such stock before the fixed date of redemption; and for this purpose, issue substituted stock

(either redeemable or irredeemable), and may also create sinking funds for the redemption at maturity of redeemable preference or debenture stock (Statutory Companies (Redeemable Stock) Act, 1915).

(c) Under the Joint Stock Companies Act, 1844.

This was the first general Act for the registration of companies, and it was passed to obviate the difficulties which arose in suing trading partnerships consisting of a very large number of members. The bodies were incorporated by the Act, but the members had unlimited liability. The Act has been repealed, but some of the companies formed under it still exist.

(d) Building Societies and Industrial and Provident Societies.

Building societies are incorporated under the Building Societies Acts, 1874 and 1894, and the liability of members is limited.

Industrial and Provident Societies are incorporated under the Industrial and Provident Societies Acts, 1893, 1895 and 1913, and the liability of members is limited.

These two classes of societies are not companies, though they resemble companies in many respects.

(e) Cost Book Mining Companies.

These companies are of an anomalous character partaking partly of the nature of a company and partly of that of a partnership. They were originally confined to the district of the Stannaries, *i.e.*, Devon and Cornwall, and were governed to a great extent by the local custom, but are now also governed by the Stannaries Acts, 1869 and 1887. Proceedings were originally held in the Court of the Vice-Warden of the Stannaries; but by the Stannaries Court (Abolition)

Act, 1896, the jurisdiction was vested in the County Courts of Cornwall.

The object of the companies is the working of mines for metals, especially tin (*Stannum*).

A number of "adventurers" combined together and agreed to share the expense and profits of working a mine. All particulars with regard to the working of the mine, the members, their interests, receipts and payments, transfer of shares, etc., are kept by the "Purser" or secretary in the Cost Book. Probably owing to the fact that the members were originally usually seagoing men, fishermen, fair-traders, etc., the nomenclature is to a certain extent nautical; the head miner being known as the "Captain." The Cost Book is made up every sixteen weeks, a meeting being called when either profits are divided or fresh calls made. The accounts are open to inspection of the members at any meeting.

Even if the number of members exceeds twenty, the company need not be registered under the Companies Act, 1929, if engaged in working mines within the Stannaries and subject to the jurisdiction of the Court exercising the Stannaries jurisdiction (§ 357). The exception applies only to metalliferous mines and tin-streaming companies; china-clay companies formed in a similar manner must be registered if the number of members exceeds twenty.

Cost Book Mining Companies which are not registered under the Companies Act, 1929, differ from companies under that Act, in the following particulars:—

- (1) The liability of members is unlimited. There is no fixed capital; calls are made as required.
- (2) A member can surrender his shares at any time, but not within six weeks of winding-up,

on paying his proportion of any deficiency then existing or taking his share of the value of the assets.

- (3) A member may transfer his shares, when all calls are paid, without the consent of the other members, but a transfer to a pauper is forbidden and regarded as fraudulent.
- (4) The liability of a retiring member lasts for two years after leaving the Company (Companies Act, 1929, § 339 (1)) instead of for one year.
- (5) The purser or any partner can bind the company on any contract other than borrowing money.
- (6) A clerk or servant is, in the event of winding-up, only preferential for three months' salary or wages, instead of four months, and the term is not to include the principal agent, manager, purser or secretary (§ 298 (1)).
- (7) Miners, artisans and labourers are preferential for the whole of their wages for three months. These wages of miners, artisans and labourers, together with compensation under the Workmen's Compensation Act, 1925, payable to a miner or the dependants of a miner, as a preferential debt, have priority to all costs (except the cost of a winding-up order), and to all claims by mortgagees, execution creditors, or any other persons, except the claims of clerks and servants in respect of their wages or salary. (§ 298 (1) (2) and (3)).

The Court may make an order charging the assets with a sum sufficient to pay these

claims with 5 per cent. per annum interest, in priority to all existing mortgagees in favour of any person who is willing to advance the necessary sum (Companies Act, 1929, § 298 (4)).

(f) Unincorporated Companies.

These companies, which cannot now be formed, took the form of large partnerships with transferable shares of a fixed amount.

They were formed by a "Deed of Settlement" between the shareholders on the one part and certain Trustees on the other, the shareholders covenanting with the Trustees to observe the provisions of the deed. The liability of the members was unlimited.

A company formed in this way can register under the Companies Act, 1929, as a limited, guarantee or unlimited company (§§ 321—336) and may, by special resolution, confirmed by the Court, substitute a Memorandum and Articles for the Deed of Settlement. A printed copy of the Memorandum and Articles must be delivered to the Registrar of Joint Stock Companies (Companies Act, 1929, § 334).

(g) Companies incorporated under the Companies Act, 1929, or under the Acts therein consolidated.

This book specially treats of such companies as are now governed by the Companies Act, 1929, which applies only to Great Britain, i.e., England (including Wales) and Scotland. This enactment is hereafter referred to as "the Act."

Considerable amendments of the then existing Companies Acts were effected by an amending statute of 1928, but with the exception of two sections, the latter Act never came into operation, being repealed with pre-existing legislation and re-enacted in the

consolidating measure passed in 1929 which came into operation on the 1st November, 1929.

The Act applies to those companies registered before the consolidation with the following exceptions :

§ 21 as to guarantee companies ;

§ 94 as to the commencement of business,
which only apply to Companies registered after
1st January, 1901.

The persons desiring to incorporate a company under the Act, must prepare and subscribe documents known as (1) a MEMORANDUM OF ASSOCIATION, which sets out the name, domicile, objects, etc., of the company, and is the constitution of the company, regulating its existence ; and (2) (unless Table A is to apply—*see below*), ARTICLES OF ASSOCIATION, which are the regulations under which the company works and carries out its objects. These, together with certain other documents (*see Chap. II*), are delivered to the Registrar of Companies for REGISTRATION (hence the generic description “registered companies”), the proper fees and duties are paid, and a Certificate of Incorporation is issued, which is, in effect, the birth certificate of the new legal person, the company. A model set of Articles known as TABLE A is contained in the First Schedule to the Act, and applies to all companies limited by shares, except where special Articles are registered which exclude or modify the terms of Table A. The present Table A applies to companies registered on or after 1st November, 1929. To companies registered prior to 1st October, 1906, the original Table A in the Schedule to the Act of 1862 ; to companies registered on or after that date but before 1st April, 1909, the revised Table A of 1906 ; and to companies registered after 31st

March, 1909, but before 1st November, 1929, the Table A in the Schedule to the Companies (Consolidation) Act, 1908, still applies. In the case of companies registered under the Joint Stock Companies Act, 1856, Table B of that Act applies (§ 380).

Companies to which one of the earlier Tables apply can, however, adopt the current Table A by passing a special resolution to that effect.

If the company is to be domiciled in England, the documents are registered at Bush House, London; if in Scotland, at Exchequer Chambers, Edinburgh. These documents, and all other documents subsequently lodged are filed by the Registrar. Any person wishing to inspect them can attend at the Companies Registration Offices and SEARCH the alphabetical list of companies for the name and distinctive number of the company, which particulars, with the name, address and occupation of the applicant, must be entered by him on a special stamped form, for which he is charged a fee of 1/-. An official will hand to the applicant the company's file in exchange for the form. The file can be examined at leisure, and, pencil notes taken. Copies can be obtained on payment of the prescribed fees (§ 314).

§ 3.—Limit of Number of Persons in Partnership.

The Companies Act, 1929, provides that NOT MORE THAN TEN PERSONS can combine together for carrying on a BANKING BUSINESS NOR MORE THAN TWENTY PERSONS for carrying on ANY OTHER KIND OF BUSINESS, that has for its object the acquisition of gain by the association or by the members thereof, unless the association is registered under that Act, or is formed in pursuance of some other Act of Parliament, or

Letters Patent, or is engaged in working mines within the Stannaries (§§ 357, 358).

An association of more than twenty persons which is NOT CARRIED ON FOR GAIN does not require registration (*St. James' Club* (1852), 2 De G. M. & G. 383), though it is very usual to find such associations so registered where they are of sufficient importance, since the advantage of limited liability may thereby be secured.

An association which consists of more than the maximum number of persons, and which ought to be registered as a company, becomes an ILLEGAL ASSOCIATION if this is not done, and CANNOT SUE ON the contracts into which it has entered (*Jennings v. Hammond* (1882), 9 Q.B.D. 225). The MEMBERS, however, will be PERSONALLY LIABLE FOR DEBTS incurred by the association in respect of goods ordered by them individually on its behalf.

A loan society consisting of more than 20 members and which has not been incorporated, cannot recover from members the amount of money lent (*Wilkinson v. Levison* (1925), 42 T.L.R. 97). The Court will, however, order an account at the instance of members of an unregistered company seeking the return of moneys handed over to agents to be applied for a purpose which has been held to be illegal (*Greenberg v. Cooperstein* (1926), Ch. 657).

A trade union may not register under the Companies Act (*Trade Union Act*, 1871 (§ 5)).

§ 4.—Classes of Companies under the Companies Act, 1929.

Any seven or more persons or, where the company to be formed will be a private company, any two or

more persons, associated for any lawful purpose may, by subscribing their names to a Memorandum of Association and otherwise complying with the requirements of the Act in respect of registration, form an incorporated company, with or without limited liability.

Such a company may be either—

- (a) A COMPANY LIMITED BY SHARES, *i.e.*, a company having the liability of its members limited by the Memorandum to the amount, if any, unpaid on the shares respectively held by them; or
- (b) A COMPANY LIMITED BY GUARANTEE, *i.e.*, a company having the liability of its members limited by the Memorandum to such amount as the members may respectively thereby undertake to contribute to the assets of the company in the event of its being wound up; or
- (c) AN UNLIMITED COMPANY, *i.e.*, a company not having any limit on the liability of its members (§ 1).

A company limited by Guarantee may also have a share capital. An unlimited company may be registered with or without a capital divided into shares.

A cross-classification of registered companies having a share capital is divided into PUBLIC and PRIVATE Companies. A PRIVATE Company is one which contains special provisions in its Articles (*see* Chap. IV, § 8).

The Act applies to companies incorporated or registered under the Acts of 1856, 1857, 1862 and 1908 as if such companies were incorporated or registered under it (§§ 316, 317).

The principal form of registration is that of companies limited by shares, whereby each person becoming a member of the company acquires one or more of the shares into which the capital is divided, his liability being limited to the amount for the time being unpaid on the shares so held.

The term "ONE MAN COMPANY" is often colloquially applied to those companies (usually private) wherein substantially the whole of the shares are held by one person.

§ 5.—Companies limited by Guarantee.

Guarantee companies are those formed (with or without a share capital) whereby each member undertakes to contribute up to a specified sum in the event of the company being wound up while he is a member, or within one year after he ceases to be a member, for payment of liabilities contracted before he ceased to be a member.

Companies of this class are usually formed for mutual insurance, or for the promotion of art, science, charity, sport, or for some similar purpose. Since, however, they are not formed for the purpose of profit, they do not usually require a trading capital, but they can acquire the benefits of incorporation by registration. If any trading is to be carried on, however, the company should have a share capital, and in practice the Registrar of Companies will not allow a company to be registered without a share capital if it appears to him that the members will have distinct interests in the profits or the capital of the company or in both.

The MEMORANDUM of every company limited by guarantee must state—

- (a) The NAME of the company, with "Limited" as the last word of the name (*but see Chap. II, § 6*).

- (b) Whether the REGISTERED OFFICE of the company is to be situate in England or in Scotland.
- (c) The OBJECTS of the Company.
- (d) That the LIABILITY of its members is LIMITED.
- (e) That EACH MEMBER UNDERTAKES TO CONTRIBUTE to the assets of the company in the event of its being wound up while he is a member, or within one year after he ceases to be a member, for payment of the debts and liabilities of the company contracted before he ceases to be a member, and of the costs, charges, and expenses of winding-up, and for adjustment of the rights of the contributories among themselves, such amount as may be required, NOT EXCEEDING A SPECIFIED AMOUNT.
- (f) In the case of such a company having a share capital the Memorandum must also state THE AMOUNT OF SHARE CAPITAL with which the company proposes to be registered and the division thereof into shares of a fixed amount (§ 2).

The wording of the guarantee clause usually follows that of Table C (contained in the First Schedule to the Act), viz. :—" 5. Every member of the company undertakes to contribute to the assets of the company in the event of its being wound up while he is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before he ceases to be a member, and the costs, charges, and expenses of winding-up, and for the adjustment of the rights of the contributories

among themselves, such amount as may be required not exceeding [ten] pounds."

The Memorandum must be subscribed as explained in Chap. III, § 2.

Where the company has not a share capital the Articles must state the NUMBER OF MEMBERS with which the company proposes to be registered (§ 7 (2)).

There MUST in the case of a company limited by guarantee be registered with the Memorandum special ARTICLES OF ASSOCIATION prescribing regulations for the company (§ 6).

Where a company not having a share capital, has increased the number of its members beyond the registered number, it must give notice of the increase to the Registrar of Companies within 15 days. In the event of default, the company and every officer in default, are liable to a fine not exceeding £5 a day (§§ 7 (3), 365 (1)).

Where the company has a share capital, every member of the company is, in the event of winding-up, liable for any amounts unpaid on his shares, in addition to his guarantee (§ 157 (3)).

In both classes of companies the amounts guaranteed are in the nature of RESERVE LIABILITY (*i.e.*, are only capable of being called up in a winding-up), and cannot be charged in favour of debenture holders (*Re Irish Club* (1906), W.N. 127).

In the case of guarantee companies not having a share capital and registered on or after the first day of January, 1901, any provision or resolution purporting to give any person a right to participate in the divisible profits otherwise than as a member is void. Any provision in the Memorandum or Articles, or in any

resolution of a company limited by guarantee, purporting to divide the undertaking into shares or interests is to be treated as a provision for a share capital, notwithstanding that the nominal amount or number of the shares or interests is not specified thereby (§ 21).

The provisions of the Companies Act, 1929, applicable to companies limited by shares apply to guarantee companies, except that—

A guarantee company having no share capital need not hold a statutory meeting (§ 113); files a special form of annual return (§ 109); and can commence business on incorporation, no statement in lieu of prospectus or certificate to commence business being required (§§ 40, 94).

§ 6.—Unlimited Companies.

Few companies, with the exception of some formed to take over private estates, are now registered with unlimited liability, and many companies which were originally so registered have re-registered as limited companies under provisions now contained in § 16 of the Act, but where this course has been adopted, the rights or liabilities of the company in respect of any debt or obligation incurred, or any contract entered into prior to the change, is not affected (*see below*).

The members are liable proportionately to their interest in the company for the whole of the debts of the company, and this liability is only determined at the expiration of one year from the date when they cease to be members. The members cannot be sued individually; action lies only against the company itself, which, whether as a going concern or in liquidation, must make calls *pari passu* upon the members.

The Memorandum of the company must state the **NAME** of the company; whether the **REGISTERED OFFICE** of the company will be situate in England or Scotland; and the **OBJECTS** of the company (§ 2), and be subscribed as explained in Chap III, § 2.

If the company has a share capital the Articles must state the amount thereof with which the company proposes to be registered (§ 7 (1)); and if it has not a share capital the Articles must state the number of members with which the company is proposed to be registered (§ 7 (2)).

Notice of any increase in the amount of capital or number of members must be given to the Registrar of Companies within 15 days of the increase under a penalty of £5 a day on the company and every officer in default (§ 7 (3)).

A company registered as unlimited may register under the Act as limited, but the registration as a limited company does not affect the rights or liabilities of the company in respect of any debt or obligation incurred or contract entered into by, to, with, or on behalf of the company before the registration, and these may be enforced against the company, and in the event of the company being wound up, every contributory is liable to contribute to the assets of the company all sums due from him in respect of debts, etc., contracted by the company before such registration.

On such registration the Registrar closes the former registration of the company, and may dispense with the delivery to him of copies of any documents with copies of which he was furnished on the occasion of the original registration of the company, but, save as aforesaid, the registration takes place in the same

manner and has effect as if it were the first registration of the company under the Act, and as if the provisions of the Acts under which the company was previously registered and regulated had been contained in different Acts from those under which the company is registered as a limited company (§§ 16, 332; 333 (f) (g)).

The effect of such registration is to give the company concerned limited liability for the future; but the past transactions of the company will not be affected, and the members will still have unlimited liability in respect of liabilities existing prior to the date of registration (*Garnett and Roseley Gold Mining Co. v. Sutton* (1865), 34 L.J. Q.B. 118).

An unlimited company having a share capital may, by its resolution for registration as a limited company do either or both of the following things :—

- (a) INCREASE THE NOMINAL AMOUNT OF ITS SHARE CAPITAL by increasing the nominal amount of each of its shares, but subject to the condition that no part of the increased capital shall be capable of being called up except in the event and for the purposes of the company being wound up ;
- (b) Provide that a specified portion of its uncalled share capital shall not be capable of being called up except in the event and for the purposes of the company being wound up (§ 53). Such uncalled capital is then known as RESERVE LIABILITY.

§ 7.—Public Companies.

Every company registered under the Companies Act, 1929, or under any of the previous Acts of 1856, 1857,

1862 or 1908, is a public company unless its Articles contain all the requisite provisions necessary to constitute it a private company (*see below*).

Even though there is never any invitation to the public to subscribe to the capital of a company, it is, nevertheless, a "public" company unless its Articles contain the express restrictions stated in the next paragraph.

§ 8.—Private Companies.

A PRIVATE COMPANY is defined under the 1929 Act as a company which by its Articles—

- (a) RESTRICTS THE RIGHT TO TRANSFER ITS SHARES ; and
- (b) LIMITS THE NUMBER OF ITS MEMBERS TO FIFTY, not including persons who are in the employment of the company, and persons who, having been formerly in the employment of the company were while in that employment, and have continued after the determination of that employment to be, members of the company ; and
- (c) PROHIBITS ANY INVITATION TO THE PUBLIC to subscribe for any shares or debentures of the company.

Where two or more persons hold one or more shares in a company jointly they are for this purpose to be treated as a single member (§ 26).

This definition is not restricted to companies limited by shares, and accordingly a company limited by guarantee or an unlimited company can be a private company if it has a share capital. A company having no share capital cannot be a private company, as it cannot comply with the above provisions.

A director is not an employee for the above purposes (*Normandy v. Ind, Coope & Co.* (1908), 1 Ch. 84).

Private companies are entitled to certain privileges and exemptions. It is convenient to include these in this Chapter, although the matters to which they refer are explained in later Chapters. They are as follows :—

A private company may consist of as few as two members, instead of the minimum of seven required in the case of a public company (§ 28).

Such companies are not required to include in the annual return a copy of the last balance sheet and auditor's report (§ 110 (3)).

It is not necessary to forward a copy of the balance sheet and auditor's report to persons entitled to receive notices of general meetings, unless, of course, the Articles so provide. Any member is, however, entitled to be furnished, within seven days after due request by him to the company, with a copy of such balance sheet and auditor's report at a charge not exceeding 6d. for every 100 words, under a penalty on the company and every officer in default of a fine of £5 a day (§ 130).

Under § 168 (4) there is no ground for winding-up in respect of diminution in number of members so long as there are at least two members.

If a private company ALTERS ITS ARTICLES so that they no longer include the provisions required under § 26, the company, as on the date of the alteration, ceases to be a private company, and must, within 14 days, deliver to the Registrar of Companies a prospectus or a statement in lieu of prospectus in the special prescribed form for the purpose of registration.

In the event of default, the company, and every officer responsible is liable to a fine of £50 (§ 27).

Should a private company MAKE DEFAULT IN COMPLYING WITH THE PROVISIONS IN ITS ARTICLES, which make it a private company, it ceases to be entitled to the privileges and exemptions above referred to. The Court may, however, grant relief in proper cases (§ 27).

Other important differences with regard to private companies as compared with public companies are as follows:—

(1) Such companies are not required to hold a statutory meeting, nor to prepare a statutory report (§ 113 (10)).

(2) The restrictions upon the appointment of directors by the Articles do not apply (§ 140 (4)).

(3) A statement in lieu of prospectus is not required to be filed so long as it remains a private company (§ 40 (2)).

(4) The restrictions as to minimum subscription and allotment imposed under § 39 do not apply.

(5) The restrictions on the commencement of business do not apply (§ 94 (7)), and it can therefore commence business immediately it is incorporated.

(6) The provision that every company registered after 1st November, 1929, must have at least two directors does not apply (§ 139).

The restrictions of transfer which the Articles of a private company must contain apparently need not be in any particular form, the ordinary clause whereby the directors at their discretion are empowered to refuse to register any transfer of shares without assigning reasons being sufficient for this purpose.

For the restriction on transfer to be operative, there must be positive exercise of the power to decline to register by the passing of a resolution, the absence of a resolution to approve not being sufficient (*In re Hackney Pavilion Ltd.* (1924), 1 Ch. 276).

The Articles of a private company frequently require a member desiring to transfer his shares to notify the board of directors of the number, price and the name of the proposed transferee, and require the board then to offer the member's shares at that price to the other shareholders (commonly called the right of pre-emption), and compel the transferor to transfer the shares to the acceptors, with a proviso that if the shares or any of them are not so accepted, the holder may transfer them at the same or any higher price to third parties approved by the board. In such a case, a proposal to accept, under the option, part only of the shares offered by the transferor is not good, and the transferor is entitled to sell to third parties, since the price to be paid for the whole number of shares might well be less than that payable for a lesser number. The offer must be accepted according to its terms (*Ocean Coal Co. v. Powell, Duffryn Steam Coal Co.* (1932), 1 Ch. 654.)

It must, moreover, be remembered that a private company cannot take power in its Articles to issue share warrants, since, as these pass by mere delivery, it is impossible to restrict the transfer of the shares referred to therein.

Should an existing company which has not made any invitation to the public to subscribe for shares or debentures, desire to become a private company, it can do so by altering its Articles to contain the relevant provisions.

If a private company pays a commission for underwriting its shares, it must file a statement in the prescribed form (§ 43 (1) (c)). There must be certified on the annual return that no invitation to subscribe for shares or debentures has been made to the public, and if the number of members exceeds 50, that the excess consists of employees or of ex-employees who were members when employed and have continued to be members since ceasing to be employed (§ 111).

§ 9.—Companies incorporated outside Great Britain.

Companies incorporated outside Great Britain which establish a place of business within Great Britain must within one month from the establishment of the place of business, deliver to the Registrar of Companies for registration—

- (a) a certified copy (*i.e.*, one certified as required by the Companies (Forms) Order, 1929, by a Government Official, Notary or Commissioner for Oaths or his equivalent) of the charter, statutes, or memorandum and articles of the company, or other instrument constituting or defining the constitution of the company, and, if the instrument is not written in the English language, a certified translation thereof ;
- (b) a list of the directors of the company, containing such particulars with respect to the directors as are by the Act required to be contained with respect to directors in the register of the directors of a company ;
- (c) the names and addresses of some one or more persons resident in Great Britain authorised

to accept on behalf of the company service of process and any notices required to be served on the company (§ 344 (1)).

If any premises whatever, even transfer offices, are opened in Great Britain, the company is considered to have a place of business within the meaning of the above provisions, but not merely by reason of doing business through an agent (*Grant v. Anderson & Co.* (1892), 1 Q.B. 108).

The appropriate Registrar is decided by the country in which the place of business is established. If the company establishes a place of business, both in England and Scotland, the company must comply with the provisions in both countries (§ 350).

If any alteration is made in—

- (1) the charter, statutes, or memorandum and articles of the company, etc. ; or
- (2) the directors of the company or the particulars contained in the list of directors ; or
- (3) the names and addresses of the persons authorised to accept service on behalf of the company ;

the company must within the prescribed time, deliver to the Registrar for registration a return containing the prescribed particulars of the alteration (§ 346).

The prescribed time is 21 days, and runs from the date on which the documents can reasonably be expected to reach Great Britain (Companies (Forms) Order, 1929).

When a company ceases to have a place of business in England or Scotland, notice of the fact must be given forthwith to the appropriate Registrar (§ 350).

A company incorporated in a British possession which has delivered to the Registrar of Companies

the documents stated above has the same power to hold land in the United Kingdom as if it were a company incorporated under the Act. This does not, however, affect the power of a company to hold lands by virtue of registration in Northern Ireland (§ 345).

Every company to which the above provisions apply must in every calendar year make out a balance sheet in such form, and containing such particulars and including such documents, as under the provisions of the Act it would, if it had been a company within the meaning of the Act, have been required to make out and lay before the company in general meeting, and deliver a copy of that balance sheet to the Registrar for registration. If any such balance sheet is not written in the English language there must be annexed to it a certified translation thereof (§ 347).

Every dominion or foreign company is required to file the balance sheet, even if, had the company been registered here, it would be a private company.

The company must also—

- (1) in every prospectus inviting subscriptions for its shares or debentures in Great Britain state the country in which the company is incorporated; and
- (2) conspicuously exhibit on every place where it carries on business in Great Britain the name of the company and the country in which the company is incorporated; and
- (3) cause the name of the company and of the country in which the company is incorporated to be stated in legible characters in all bill-heads and letter paper, and in all notices, advertisements and other official publications of the company; and

- (4) if the liability of the members of the company is limited, cause notice of that fact to be stated in legible characters in every such prospectus as aforesaid and in all bill-heads, letter paper, notices, advertisements and other official publications of the company in Great Britain, and to be affixed on every place where it carries on its business (§ 348).

Any process or notice required to be served on the company is sufficiently served if addressed to any person whose name has been delivered to the Registrar under § 344 and left at or sent by post to the address which has been so delivered ; but

- (1) where any such company makes default in delivering to the Registrar the name and address of a person resident in Great Britain who is authorised to accept on behalf of the company service of process or notices ; or
- (2) if at any time all the persons whose names and addresses have been so delivered are dead or have ceased so to reside, or refuse to accept service on behalf of the company, or for any reason cannot be served ;

a document may be served on the company by leaving it at or sending it by post to any place of business established by the company in Great Britain (§ 349).

If any company fails to comply with any of the foregoing provisions, the company, and every officer or agent of the company, is liable to a fine not exceeding £50, or, in the case of a continuing offence, £5 for every day during which the default continues (§ 351).

For the above purposes —

The expression “certified” means certified in the prescribed manner to be a true copy or a correct translation.

The expression "director" in relation to a company includes any person in accordance with whose directions or instructions the directors of the company are accustomed to act.

The expression "place of business" includes a share transfer or share registration office.

The expression "prospectus" has the same meaning as when used in relation to a company incorporated under the Act (§ 352).

Where a company incorporated in the Channel Islands or the Isle of Man establishes or continues to have a place of business in England or Scotland all the provisions of the Act requiring documents to be forwarded or delivered to, or filed with, the Registrar of Companies (other than provisions requiring the payment of a fee in respect of the registration of a company) apply to the company in like manner as if it were a company registered in England or Scotland, as the case may be, and if the company establishes places of business both in England and in Scotland the said provisions so apply as if the company were registered both in England and in Scotland (§ 353). Such a company is thus virtually placed in the same position as a company incorporated under the Act; the provisions are much more stringent than in the case of dominion and foreign companies.

A foreign company can be wound up here if it has a branch or office, assets or creditors in this country, but if it is already in course of being wound up in the country of its original domicile the liquidation here is supplemental to the foreign winding-up, and the English liquidator will be restricted to dealing with the assets in this country (*Commercial Bank of South Australia* (1886), 33 Ch. D. 174).

If a foreign company merely carries on business by agents it cannot be wound up in this country (*Lloyd Generale Italiano* (1885), 29 Ch. D. 219).

There are also stringent provisions as to the issue, circulation or distribution in Great Britain of prospectuses, offers for sale, etc., of dominion and foreign companies. These are dealt with hereafter in Chap. VI, § 9.

SYNOPSIS OF CHAPTER II.

REGISTRATION OF A COMPANY.

§ 1 —THE PROMOTION OF A COMPANY

2 —PRELIMINARIES TO INCORPORATION

3 —FEEs ON REGISTRATION

4 —CERTIFICATE OF INCORPORATION

5 —THE EFFECT OF INCORPORATION

6 —SPECIAL PROVISIONS APPLICABLE TO ASSOCIATIONS NOT FOR PROFIT.

7 —REGISTRATION UNDER THE ACT OF COMPANIES NOT FORMED UNDER
THE ACT OF 1929

CHAPTER II.

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REGISTRATION OF A COMPANY.

§ 1.—The Promotion of a Company.

A registered company may be formed either for the purpose of transferring a business already in existence from private to corporate ownership, or for the purpose of commencing an entirely new business.

The preliminaries incidental to the formation of the company are usually carried out by one or more persons called “promoters.” Apart from a reference to the meaning of the term in § 37 of the Act, as applicable to that section, there is no statutory definition of “promoter,” and the Courts are very reluctant to define exactly what a promoter is. It is a question of fact in each case as to whether a person has so related himself to the process of registering a company as to be deemed a promoter of it. The absence of precise definition makes it more difficult for a person to be active in the promotion of companies and yet to keep outside the strict legal conception of a promoter so as to avoid the obligations to which, as will be seen, promoters are subject (*see dictum of Bowen L. J. in Whaley Bridge Printing Co. v. Green* (1880), 5 Q.B.D. 109). A registered company may act as promoter and in modern company practice this is generally found to be the case, a company or

syndicate often being specially formed for that purpose. In some instances the vendor of the property, business or other enterprise which the company is to acquire may himself act in the capacity of promoter.

The promoter, if a business is to be acquired, enters into negotiations for the acquisition of the business and agrees terms with the vendor, in consequence of which a provisional agreement is often entered into upon the terms of which the company to be formed will ultimately acquire the property.

The promoter must settle the company's name and ascertain that it will be accepted by the Registrar of Companies. He must also determine the domicile, objects and capital of the company, arrange for any special provisions in the company's Articles, the nomination of directors, solicitors, bankers, brokers, auditors, and secretary, and the registered office of the company. He arranges for the printing of the Memorandum and Articles of Association of the company, the registration of the company, the issue of a prospectus if a public issue is necessary, and is, in fact, responsible for bringing the company into existence for the objects which the promotion has in view.

The acquisition of a business, property, concessions or other rights which it is desired to transfer to the company on its formation is generally subject to a contract prior to the registration of the company. To that contract the company, which does not then exist, cannot be a party. Accordingly, the negotiations must take place between the vendor of the property concerned and the promoter or some other person as trustee for the projected company, and frequently a formal contract is executed by those

parties. In such a case the trustee for the company should for his own protection, expressly stipulate that he is to be relieved of any personal liability on the contract, in the event of the company not being formed within a prescribed period, or refusing or omitting upon formation to take over the rights and obligations of the "vending agreement" by a contract of novation. Otherwise he will be personally liable under the contract entered into with the vendor (*Kelner v. Baxter* (1866), L.R. 2 C.P. 174). Apart from a novation, the company cannot be bound by that contract, and cannot enforce or ratify it, even if the Articles purport to "adopt" the contract (*Northumberland Avenue Hotel Co.* (1886), 33 Ch. D. 16). This is so because when the transaction was originally made, the company had no existence in law so that no person could have been authorised to act on its behalf (*Kelner v. Baxter, supra*; *Natal Land Co. v. Pauline Colliery Syndicate Ltd.* (1904), A.C. 120). The effect of a "novation" is to extinguish by agreement the contract between the vendor and the promoter or trustee, and to substitute a new contract on the same terms between the vendor and the company.

To avoid these difficulties, it is now common for a draft agreement only to be prepared and initialled for reference by the solicitors or by the directors named in the Articles. A clause is then inserted in the Memorandum or Articles referring to this draft agreement which it is intended that the company should, upon registration, execute as a contract. Until it is executed of course neither party is bound.

Persons who perform duties (e.g., the preparation of the Memorandum and Articles of Association) in contemplation of the formation of the company

should look to the promoter for their remuneration, since the company itself would not be liable. Thus, where a solicitor had prepared the Memorandum and Articles on the instructions of persons who became the directors of the company, it was held that the company was not liable, in spite of the fact that it had the benefit of the work (*re English and Colonial Produce Co.* (1906), 2 Ch. 435). The persons upon whose instructions the work was done would alone be liable (*Kelner v. Baxter, supra*).

If the company is registered before the vending contract is made it can, of course, be entered into by the company itself; but the directors must *bonâ fide* exercise their judgment upon it, and if they are not an independent board (*e.g.*, they are the same persons as, or nominees of, the vendors), the company may repudiate the contract (*Lagunas Nitrate Co. v. Lagunas Syndicate* (1899), 2 Ch. 392; *Erlanger v. New Sombrero Phosphates Co.* (1879), 3 App. Cas. 1218; *Gluckstein v. Barnes* (1900), App. Cas. 240).

As soon as the promoter begins to act for or promote the company he is in a fiduciary position and must disclose any profits made by the promotion (*Gluckstein v. Barnes* (1900), A.C., 240).

Where a secret profit is made by a person who is a promoter at the time the profit accrues, the company is entitled to claim damages for breach of his fiduciary duty and to require him to account for the profit. If he is also the vendor to the company it may repudiate the contract of sale; but neither damages nor the secret profit can be claimed by the company if, at the time the vendor himself acquired the subject-matter of the contract of sale, he was not already in a fiduciary position as regards the company, *i.e.*,

if he had not then begun to be a promoter of it (*Leeds and Hanley Theatres of Varieties* (1902), 2 Ch. 809).

Profits are "secret" unless disclosed to an independent board, or to all subscribers for shares, at the time the contract with the company is made (*Lagunas Nitrate Co. v. Lagunas Syndicate*, *supra*). A promoter is not required to account for profits made before he became under fiduciary obligations, but he must disclose his interest, and if he is selling his own property, the company must, on coming into existence, be informed that the vendor and the promoter are the same person (*Bentinck v. Fenn* (1888), 12 A.C. 652; *Ladywell Mining Co. v. Brookes* (1887), 35 Ch. D. 400).

Where a person had been induced by the fraudulent misrepresentation of other promoters to subscribe funds towards the purchase of property to be sold to the company by the promoters, for which he received shares and debentures of a nominal value considerably in excess of the amount paid, the shares (although ultimately worthless) having acquired a fictitious value through fraudulent acts of the promoters, he was regarded as being himself one of the promoters of the company and, as he had dealt with them as validly issued, he was held to be liable to account for the profits which he had made out of the shares, although owing to the fact that no prospectus or statement in lieu of prospectus had been filed, they were void when issued (*Jubilee Cotton Mills Ltd. v. Lewis* (1924), A.C. 958).

The consideration for the services of the promoter is usually paid out of the purchase money. In any case it must be disclosed in a prospectus or statement in lieu of prospectus issued or filed by the company.

The promoter is liable for the " preliminary expenses" attendant upon the incorporation of the company unless the company actually agrees to pay them. It has been pointed out that a company cannot ratify contracts entered into before it was in existence, and therefore it can only make itself liable by agreement under seal or for valuable consideration after it has been registered.

The promoter, if such an agreement is so entered into, should be sure that there is a fresh consideration, since the past consideration will not be sufficient to render the company liable; and if fully paid shares are issued for the services of promotion there must be valuable consideration, otherwise the allottee will be liable to pay up the nominal amount thereof (*Eddystone Marine Insurance Co.* (1893), 3 Ch. 9).

The amount or estimated amount of the PRELIMINARY EXPENSES must be stated in the prospectus and an account or estimate thereof must appear in the statutory report. These expenses include such items as the cost of registering the company, filing necessary documents, stamp duties, and fees thereon; cost of preparing and printing Memorandum and Articles of Association; cost of preparing, printing, and circulating the prospectus; cost of all preliminary agreements, including stamp duties; cost of preparing and printing share certificates, debentures, debenture trust deed, letters of allotment and necessary stamp duties relating thereto; cost of the original books and of the company's seal; valuers' fees for valuing assets proposed to be acquired, and accountants' charges for certifying profits, etc.

The company usually takes powers in the Memorandum or Articles to pay the preliminary expenses; if this power is not taken, however, the company

can still pay them, including commission for placing shares (*Licensed Victuallers' Mutual Trading Association* (1889), 42 Ch. D. 1; *Metropolitan Coal Consumers' Association v. Scrimgeour* (1895), 2 Q.B. 604).

Such powers contained in the Memorandum or Articles do not, however, give a right of action against the company to promoters and others in respect of such expenses (*Rotherham Chemical Co.* (1884), 25, Ch. D. 103.)

§ 2.—Preliminaries to Incorporation.

Before a company can be registered there must be filed with the Registrar of Companies for that part of Great Britain (*i.e.*, England (which includes Wales) or Scotland), where the company is to be domiciled :

- (1) The MEMORANDUM OF ASSOCIATION (§ 12), signed by at least seven members in the case of a public company, or two in the case of a private company (§ 1); in the case of a company having a share capital each subscriber must state opposite his signature the number of shares he takes, and cannot take less than one share (§ 2). The signature of each subscriber must be attested by a witness (§ 3).
- (2) The ARTICLES OF ASSOCIATION (§§ 6, 12), signed by the signatories to the Memorandum in the presence of a witness who must attest the signature (§ 12).

In the case of a company limited by shares, Articles can be dispensed with unless it is a private company. If no Articles are filed, Table A applies, but the Memorandum must be endorsed : “ Registered without

Articles of Association.” The form of the Memorandum and in the case of companies other than those limited by shares, the Articles must be as near the specimens in Tables B, C, D, or E, as circumstances admit (§ 11).

(3) A STATEMENT OF THE NOMINAL CAPITAL.

(4) A STATUTORY DECLARATION (*i.e.*, a solemn declaration made before a Commissioner for Oaths or Justice of the Peace, etc.), by a solicitor of the Supreme Court engaged in the formation of the company or by a person named in the Articles as a director or secretary of the company, that all the requirements of the Act in respect of registration and of matters precedent or incidental thereto have been complied with (§ 15 (2)).

The above documents are all that are necessary for a private company. In the case of a public company having a share capital there must be filed, in addition to the above, the following documents:—

(5) A list of the persons who have consented to be directors of the company (§ 140 (3)).

(6) If the first directors are appointed by the Articles—

(a) the WRITTEN CONSENT OF THESE DIRECTORS TO ACT, signed by themselves, or by an agent duly authorised in writing, and

(b) AN UNDERTAKING IN WRITING SIGNED BY EACH SUCH DIRECTOR TO TAKE from the company and pay for HIS QUALIFICATION SHARES (if any) unless he has signed the Memorandum for a number of shares not less than his qualification (§ 140 (1)).

§ 3.—Fees on Registration.

The following are the provisions as to the fees required to be paid to the Registrar of Companies under the Act :—

§ 313.—(1) There shall be paid to the registrar in respect of the several matters mentioned in the Table set out in the Tenth Schedule to this Act the several fees therein specified.

(2) All fees paid to the registrar in pursuance of this Act shall be paid into the Exchequer.

TENTH SCHEDULE.

TABLE OF FEES TO BE PAID TO THE REGISTRAR OF COMPANIES.

I. By a company having a share capital.

	£	s.	d.
For registration of a company whose nominal share capital does not exceed £2,000	2	0	0
For registration of a company whose nominal share capital exceeds £2,000, the following fees, regulated according to the amount of nominal share capital (that is to say) :	£	s.	d.
For every £1,000 of nominal share capital, or part of £1,000, up to £5,000 ..	1	0	0
For every £1,000 of nominal share capital, or part of £1,000, after the first £5,000 up to £100,000	0	5	0
For every £1,000 of nominal share capital, or part of £1,000, after the first £100,000 ..	0	1	0
For registration of any increase of share capital made after the first registration of the company, the same fees per £1,000, or part of £1,000, as would have been payable if the increased share capital had formed part of the original share capital at the time of registration :			
Provided that no company shall be liable to pay in respect of nominal share capital, on registration or afterwards, any greater amount of fees than £50, taking into account in the case of fees payable on an increase of share capital after registration the fees paid on registration.			
For registration of any existing company, except such companies as are by this Act exempted from payment of fees in respect of registration under this Act, the same fee as is charged for registering a new company.			
For registering any document by this Act required or authorised to be registered or required to be delivered sent or forwarded to the registrar other than the memorandum or the abstract required to be delivered to the registrar by a receiver or manager or the statement required to be sent to the registrar by the liquidator in a winding-up in England ..	0	5	0
For making a record of any fact by this Act required or authorised to be recorded by the registrar	0	5	0

II. By a company not having a share capital.

For registration of a company whose number of members, as stated in the articles, does not exceed 25	£	s.	d.
	2	0	0
For registration of a company whose number of members as stated in the articles exceeds 25, but does not exceed 100, the above fee of £2 with an additional £1 for every additional 25 members or less after the first 25.			
For registration of a company whose number of members, as stated in the articles, exceeds 100, but is not stated to be unlimited, a fee of £5, with an additional 5s. for every 50 members or less after the first 100.			
For registration of a company in which the number of members is stated in the articles to be unlimited	20	0	0
For registration of any increase in the number of members made after the registration of the company in respect of every 50 members, or less than 50 members, of that increase		0	5 0
Provided that no company shall be liable to pay on the whole a greater fee than £20 in respect of its number of members, taking into account the fee paid on the first registration of the company.			
For registration of any existing company, except such companies as are by this Act exempted from payment of fees in respect of registration under this Act, the same fee as is charged for registering a new company.			
For registering any document by this Act required or authorised to be registered or required to be delivered, sent or forwarded to the registrar, other than the memorandum or the abstract required to be delivered to the registrar by a receiver or manager or the statement required to be sent to the registrar by the liquidator in a winding-up in England ..		0	5 0
For making a record of any fact by this Act required or authorised to be recorded by the registrar		0	5 0

The Memorandum of Association must be impressed with a ten shilling deed stamp (§ 3), and with a fee stamp according to the nominal capital as stated above.

The Articles must be impressed with a ten shilling deed stamp (§ 9), and with a fee stamp of five shillings.

An *ad valorem* stamp duty is also imposed on the statement of nominal capital at the rate of ten shillings for each hundred pounds or fraction of one hundred pounds of the nominal capital; and a similar duty must be paid upon any increase of capital subsequently registered (Stamp Act, 1891, § 112; Revenue Act, 1899, § 7; Finance Act, 1920, § 39; Finance Act, 1933, § 41).

Each of the other documents must be stamped with a companies registration fee of 5/- per document. The undertaking of directors to take up their qualification shares (if any) must bear a 6d. stamp for each director if the nominal value of the qualification exceeds £5.

Owing to the great increase in amalgamations, etc., and to the formation, within recent years, of a large number of companies for the purpose of acquiring a controlling interest in companies already in existence, provision was made in the Finance Act, 1927, § 55 (amended by the Finance Act, 1928, § 31, and Finance Act, 1930, § 41), whereby relief is afforded in connection with the *ad valorem* duty and stamp duties which, in ordinary circumstances, would be payable. Relief is also given in respect of stamp duties which would otherwise be payable on the transfer of property or shares. As amended, the section is as follows:—

§ 55.—(1) If in connection with a scheme for the reconstruction of any company or companies or the amalgamation of any companies, it is shown to the satisfaction of the Commissioners of Inland Revenue that there exist the following conditions that is to say —

- (a) That a company with limited liability is to be registered, or that since the commencement of this Act a company had been incorporated by letters patent or Act of Parliament or the nominal share capital of a company has been increased,
- (b) That the company (in this section referred to as the “transferee company”) is to be registered or has been incorporated or has increased its capital with a view to the acquisition either of the undertaking of, or of not less than ninety per cent of the issued share capital of any particular existing company,
- (c) That the consideration for the acquisition (except such part thereof as consists in the transfer to or discharge by the transferee company of liabilities of the existing company) consists as to not less than ninety per cent thereof—
 - (i) where an undertaking is to be acquired in the issue of shares in the transferee company to the existing company or to holders of shares in the existing company, or
 - (ii) where shares are to be acquired, in the issue of shares in the transferee company to the holders of shares in the existing company in exchange for the shares held by them in the existing company,

then subject to the provisions of this section—

(A) The nominal share capital of the transferee company, or the amount by which the capital of the transferee company has been increased, as the

case may be, shall, for the purpose of computing the stamp duty chargeable in respect of that capital, be treated as being reduced by either—

- (i) an amount equal to the amount of the share capital of the existing company **[in respect of which stamp duty has been paid, or relief has been allowed under the provisions of this section]*; or, in the case of the acquisition of a part of an undertaking, equal to such proportion of the said share capital as the value of that part of the undertaking bears to the whole value of the undertaking; or
- (ii) the amount to be credited as paid up on the shares to be issued as such consideration as aforesaid, *and on the shares, if any, to be issued to creditors of the existing company in consideration of the release of debts (whether secured or unsecured) due or accruing due to them from the existing company or of the assignment of such debts to the transferee company,*

whichever amount is the less; and

(B) Stamp duty under the heading "Conveyance or Transfer on Sale" in the First Schedule to the Stamp Act, 1891, shall not be chargeable on any instrument made for the purposes of or in connection with the transfer of the undertaking or shares, *or on any instrument made for the purposes of or in connection with the assignment to the transferee company of any debts, secured or unsecured of the existing company,* nor shall any such duty be chargeable, under section twelve of the Finance Act, 1895, on a copy of any Act of Parliament, or on any instrument vesting, or relating to the vesting of the undertaking or shares in the transferee company:

Provided that—

- (a) no such instrument shall be deemed to be duly stamped unless either it is stamped with the duty to which it would but for this section be liable or it has in accordance with the provisions of section twelve of the Stamp Act, 1891, been stamped with a particular stamp denoting either that it is not chargeable with any duty or that it is duly stamped; and
- (b) in the case of an instrument made for the purposes of or in connection with a transfer to a company within the meaning of the Companies Act, 1929, the provisions of paragraph (B) of this subsection shall not apply unless the instrument is either—
- (i) executed within a period of twelve months from the date of the registration of the transferee company or the date of the resolution for the increase of the nominal share capital of the transferee company, as the case may be; or
- (ii) made for the purpose of effecting a conveyance or transfer in pursuance of an agreement which has been filed, or particulars of which have been filed, with the registrar of companies within the said period of twelve months; and
- (c) *the foregoing provision with respect to the release and assignment of debts of the existing company shall not, except in the case of debts due to banks or to trade creditors, apply to debts which were incurred less than two years before the proper time for making a claim for exemption under this section.*

(2) For the purposes of a claim for exemption under paragraph (B) of subsection (1) of this section, a company which has, in connection with a scheme of reconstruction or amalgamation, issued any unissued share capital shall be treated as if it had increased its nominal share capital.

(3) A company shall not be deemed to be a particular existing company within the meaning of this section unless it is provided by the memorandum of association of, or the letters patent or Act incorporating, the transferee company that one of the objects for which the company is established is

* The words in parentheses do not operate with regard to any amalgamation or reconstruction effected after the commencement of the Finance Act, 1930 (1st August, 1930).

the acquisition of the undertaking of, or shares in, the existing company, or unless it appears from the resolution, Act or other authority for the increase of the capital of the transferee company that the increase is authorised for the purpose of acquiring the undertaking of, or shares in, the existing company.

(4) In a case where the undertakings of, or shares in, two or more companies are to be acquired, the amount of the reduction to be allowed under this section in respect of the stamp duty chargeable in respect of the nominal share capital or the increase of the capital of a company shall be computed separately in relation to each of those companies.

(5) Where a claim is made for exemption under this section, the Commissioners of Inland Revenue may require the delivery to them of a statutory declaration in such form as they may direct, made in England by a solicitor of the Supreme Court or in Scotland by an enrolled law agent, and of such further evidence, if any, as the Commissioners may reasonably require.

(6) If—

- (a) where any claim for exemption from duty under this section has been allowed, it is subsequently found that any declaration or other evidence furnished in support of the claim was untrue in any material particular, or that the conditions specified in subsection (1) of this section are not fulfilled in the reconstruction or amalgamation as actually carried out; or
- (b) where shares in the transferee company have been issued to the existing company in consideration of the acquisition, the existing company within a period of two years from the date, as the case may be, of the registration or incorporation, or of the authority for the increase of the capital, of the transferee company ceases, otherwise than in consequence of reconstruction, amalgamation or liquidation, to be the beneficial owner of the shares so issued to it; or
- (c) where any such exemption has been allowed in connection with the acquisition by the transferee company of shares in another company, the transferee company within a period of two years from the date of its registration or incorporation or of the authority for the increase of its capital, as the case may be, ceases, otherwise than in consequence of reconstruction, amalgamation or liquidation, to be the beneficial owner of the shares so acquired;

the exemption shall be deemed not to have been allowed, and an amount equal to the duty remitted shall become payable forthwith, and shall be recoverable from the transferee company as a debt due to His Majesty, together with interest thereon at the rate of five per cent. per annum in the case of duty remitted under paragraph (A) of sub-section (1) of this section from the date of the registration or incorporation of the transferee company or the increase of its capital, as the case may be, and in the case of duty remitted under paragraph (B) of the said subsection from the date on which it would have become chargeable if this Act had not passed.

(7) If in the case of any scheme of reconstruction or amalgamation the Commissioners of Inland Revenue are satisfied that at the proper time for making a claim for exemption from duty under subsection (1) of this section there were in existence all the necessary conditions for such exemption other than the condition that not less than ninety per cent. of the issued share capital of the existing company would be acquired by the transferee company, the Commissioners may, if it is proved to their satisfaction that not less than ninety per cent. of the issued capital of the existing company has under the scheme been acquired within a period of six months from the earlier of the two following dates, that is to say—

- (a) the last day of the period of one month after the first allotment of shares made for the purposes of the acquisition; or

(b) the date on which an invitation was issued to the shareholders of the existing company to accept shares in the transferee company; and on production of the instruments on which the duty paid has been impressed, direct repayment to be made of such an amount of duty as would have been remitted if the said condition had been originally fulfilled.

(8) In this section, unless the context otherwise requires—

References to the undertaking of an existing company include references to a part of the undertaking of an existing company.

The expression "shares" includes stock.

NOTE.—the words *italicised* are the amendments made by the Finance Act, 1928.

The above provisions cover the following cases :—

- (1) Where a limited company is formed or an existing limited company's capital is increased for the purpose of buying up the undertaking (i.e., the business) or part of the undertaking of another company, and at least 90% of the consideration for the acquisition (other than any arrangements for taking over or paying off creditors) consists of the allotment of shares in the buying company to the vending company or to the vending company's members.
- (2) Where a limited company is formed, or an existing limited company increases its capital, for the purpose of acquiring at least 90% of the issued share capital of another company. In this case, the buying company becomes a holding company, and if at least 90% of the consideration consists of the allotment of shares in the holding company to the shareholders of the existing company in exchange for their shareholdings, the scheme comes within the relief provisions.

In either of the above cases, for the purposes of charging the capital duty of 10/- per cent. on the nominal capital or increased capital, as the case may be, that capital is to be reduced by an amount equal to the

share capital of the vending or subsidiary company. If, however, only part of the undertaking of the vending company is acquired then the reduction is that proportion of the share capital of the vending company which the part of the undertaking acquired bears to the whole undertaking. But if the shares issued as consideration are partly paid, only the amount credited as paid up (including the amount credited in shares issued to creditors in consideration for the release or assignment of debts) is available for relief, if this is less than the amount ascertained by taking the proportion of the share capital mentioned in the last sentence above.

No stamp duty is chargeable on any contract, transfer or assignment made for the purpose of transferring to the buying or holding company, the undertaking or shares or debts due to creditors of the vending company, providing the contract, etc., is duly stamped with a "denoting stamp" showing that it is not chargeable with duty; and is executed within 12 months from the date of registration of the new company or increase of capital, as the case may be, or is made to give effect to an agreement (or particulars thereof) filed with the Registrar of Companies within such 12 months. (The agreement here referred to is that required on an allotment of shares for a consideration other than cash.) The debts due to creditors other than banks or trade creditors must have been incurred more than two years prior to the time of claiming exemption. For the purpose of exemption from contract, etc., stamp duty, a company which issues any unissued capital for the purpose of a reconstruction or amalgamation, is included in the relief (although no relief from capital stamp duty is available).

For the purposes of relief from any of the duties, the newly formed buying company's Memorandum of Association must include as one of its objects the acquisition of the undertaking or shares of the vendor company, or in the case of an existing company increasing its capital, the resolution must state the purpose of the increase.

If two or more companies are involved as vending companies, the relief is to be computed separately for each company.

The relief will be disallowed, and the appropriate duties, with interest at 5% per annum, charged where—

- (a) it is subsequently found that any material particular in the claim was untrue, or
- (b) the conditions are not fulfilled ; or
- (c) within two years the vending company parts with the shares issued to it, otherwise than on reconstruction, amalgamation or liquidation ; or
- (d) within two years the holding company parts with the shares acquired otherwise than on reconstruction, etc.

The Commissioners may allow relief from capital duty to a holding company, where all the other conditions are satisfied, if the acquisition of 90% or more of the shares in the vending company is completed within six months from the issue of the invitation to the members of the vending company to exchange their shares, or seven months from the first allotment of shares for the purposes of the acquisition, if earlier. In such a case, the duty already paid will be repaid.

It has been held that for the purposes of § 55, Finance Act, 1927, the legal as well as the equitable title must

pass in order to constitute an "issue" of shares; where the transferee company sent out allotment letters, with forms of renunciation attached, to the shareholders of the transferor company, and so many of them renounced that of the first registered shareholders in the transferee company, those who had been shareholders in the transferor company held less than 90 per cent. of the shares in the new company, this did not constitute an issue of shares to the old shareholders entitling the company to relief (*Oswald Tillotson, Ltd. v. Commissioners of Inland Revenue* (1932), 48 T.L.R. 582).

§ 4.—Certificate of Incorporation.

When the proper documents have been lodged, the prescribed fees paid, and the Registrar is satisfied that all matters precedent and incidental to registration have been complied with, he issues to the company a Certificate of Incorporation certifying that the company is incorporated, and in the case of a limited company that the company is limited (§ 13 (1)).

In practice, the certificate is issued, provided everything is in order, on the second official day following the payment of the fees.

§ 5.—The Effect of Incorporation.

From the date of incorporation mentioned in the certificate of incorporation, the subscribers of the Memorandum, together with such other persons as may from time to time become members of the company, are a body corporate by the name contained in the Memorandum, capable forthwith of exercising all the functions of an incorporated company, and

having perpetual succession and a common seal, but with such liability on the part of the members to contribute to the assets of the company in the event of its being wound up as is mentioned in the Act (§ 13 (2)).

The importance of the separate identity of a company was well illustrated in *Salomon v. Salomon & Co., Ltd.* ((1897), A.C. 22), where Salomon sold his business to the company, which was formed for the purpose. His wife, daughter and four sons took up one £1 share each, Salomon took 20,000 £1 shares as part of the consideration for the transfer of the business, the balance of the purchase price being satisfied by the issue to him of £10,000 debentures in the company, which gave him a charge over the assets. The company was subsequently wound up, the assets being then worth £6,000, and the creditors other than Salomon amounting to £7,000. The unsecured creditors claimed that Salomon and the company were one person, and therefore the company could not owe him £10,000 on the debentures, and that the assets should be applied towards paying their debts. It was held by the House of Lords that as soon as the company was duly incorporated it became in the eyes of the law a separate PERSON from Salomon, and Salomon, although virtually the holder of all the shares in the company was none the less also a creditor secured by his debentures and as such was entitled to repayment in priority to the unsecured creditors, i.e., he took the £6,000 available, and the other creditors got nothing.

A registered company has power to hold lands, but if it is a company formed for the purpose of promoting art, science, religion, charity or any other like object not involving the acquisition of gain by the company or by its individual members, it cannot hold more than two acres of land except by licence of the Board of Trade (§ 14).

The Certificate of Incorporation is **CONCLUSIVE EVIDENCE** that the requirements of the Act in respect of registration and matters precedent and incidental thereto have been complied with and that the company is duly registered (§ 15). It is therefore conclusive evidence that there is a company and that company is duly incorporated (*Hammond v. Prentice Bros., Ltd.* (1920), 1 Ch. 201). The existence of the company operates from the earliest moment of the day of incorporation stated in the certificate (*In re Jubilee Cotton Mills, Ltd.* (1924), A.C. 958).

The Certificate of Incorporation is only conclusive evidence that the company is authorised to be registered so far as ministerial (*i.e.*, administrative) acts are concerned (*British Association of Glass Bottle Manufacturers v. Nettlefold* (1911), 27 T.L.R. 527). It is not conclusive evidence that the company is one which could lawfully be registered, *e.g.*, that it is not in reality a trade union, which cannot lawfully be registered under the Companies Act (*ibid.* and § 382 (7); Trades Union Act, 1871, § 5); nor is it conclusive as to the legality of the company's objects (*Bowman v. Secular Society* (1917), A.C. 406).

A private company can commence business immediately upon incorporation, but a public company having a share capital must obtain a certificate entitling it to commence business (§ 94) (*see* Chap. VII).

§ 6.—Special provisions applicable to Associations not for profit.

As already stated, a company formed for the PROMOTION OF ART, SCIENCE, RELIGION, CHARITY OR ANY OTHER LIKE OBJECT NOT INVOLVING THE ACQUISITION OF GAIN by the company or its members, cannot hold more than two acres of land without the licence of the Board of Trade (§ 14).

Where it is proved to the satisfaction of the Board of Trade that an association about to be formed as a limited company is to be formed for promoting COMMERCE, ART, SCIENCE, RELIGION, CHARITY, OR ANY OTHER USEFUL OBJECT, and intends to apply its profits (if any) or other income in promoting its objects, and to PROHIBIT THE PAYMENT OF ANY DIVIDEND to its members, the Board may by licence direct that the association may be registered as a company with limited liability, WITHOUT THE ADDITION OF THE WORD "LIMITED" to its name, and the association may be registered accordingly.

This licence may be granted on such conditions and subject to such regulations as the Board think fit, and those conditions and regulations are binding on the association, and must, if the Board so direct, be inserted in the Memorandum and Articles, or in one of those documents.

The association on registration enjoys all the privileges of ordinary limited companies other than their unqualified power to hold lands, and is subject to all their obligations, except those of using the word "Limited" as any part of its name, and of publishing its name, and of sending lists of members to the Registrar of Companies.

The licence may at any time be revoked by the Board of Trade, and upon revocation the Registrar

enters the word "Limited" at the end of the name of the association upon the register, and the association ceases to enjoy the exemptions and privileges stated above; but before a licence is so revoked the Board must give to the association notice in writing of their intention, and afford the association an opportunity of being heard in opposition to the revocation. Where the name of the association contains the words "Chamber of Commerce," this notice must include a statement to the effect that the company must, within a period of six weeks from the date of the revocation or such longer period as may be allowed by the Board of Trade, change its name to one that does not contain those words (§§ 18, 19 (3)).

It will be observed that any company to which a licence to dispense with the word "Limited" has been granted under the provisions of § 18, is not required to publish its name under § 93 (*see* Chap. VIII, § 2), as in the case of other companies, nor need it include in its annual return a list of members. It must, however, file a copy of the Register of Directors.

In many cases these associations are incorporated as companies limited by guarantee, and reference should therefore be made to Chap. I, § 5.

§ 7.—Registration under the Act of Companies not formed under the Act of 1929.

Any company formed prior to 2nd November, 1862, when the Companies Act, 1862, came into operation, and any company formed since that date under Act of Parliament, or letters patent, or within the Stannaries, or otherwise duly constituted according to law, provided it consists of seven or more members, may register under the Act as unlimited or as limited by shares or guarantee or both.

Such registration is, however, subject to the following qualifications :—

- (i) A company registered under the Acts of 1862 or 1908, cannot so register.
- (ii) A company having its liability limited by Act of Parliament or letters patent and not being a joint stock company cannot effect such registration.
- (iii) A company having the liability of its members, limited by Act of Parliament, cannot register as unlimited or as limited by guarantee.
- (iv) A company which is not a joint stock company cannot register as a company limited by shares.
- (v) A company cannot register without the assent of a majority of such of its members as are present in person or by proxy (if allowed by the company's regulations) at a general meeting summoned for the purpose.
- (vi) Where a company not having the liability of its members limited by Act of Parliament or letters patent seeks such registration, the majority must be not less than three-fourths of the members present in person or by proxy at the meeting.
- (vii) Where the company is to be registered as limited by guarantee, the assent must be accompanied by a resolution declaring the undertaking and amount of each member's guarantee (§ 321).

In this connection, a joint stock company is defined as a company having a permanent paid-up or nominal share capital of fixed amount, divided into shares also of fixed amounts, or held and transferable as

stock, or divided and held partly in one way and partly in the other, and formed on the principle of having for its members the holders of those shares or that stock, and no other persons (§ 322).

Before the registration of a joint stock company under these provisions, there must be delivered to the Registrar of Companies the following:—

- (1) A list of members.
- (2) A copy of the Act of Parliament, Royal Charter, Letters Patent, Deed of Settlement, Cost Book Regulations or other instrument constituting or regulating the company.
- (3) If the company is to be registered as limited, a statement of the nominal capital, number of shares or amount of stock of which it consists, number of shares taken and the amount paid on each share; the name of the company with the word “limited” as the last word, and
- (4) If limited by guarantee, the resolution declaring the amount of the guarantee (§ 323).

If the company is not a joint stock company, a list of the directors or managers is substituted for (1) above, and (3) is not required (§ 324).

No fees are payable if the company is not registered as limited, or if it is already a limited company (§ 327).

Registration does not affect existing debts, obligations or contracts of the company (§ 331); and it does not operate to relieve from liability as a contributory, in the event of the winding-up of the company, any person who was liable at the date of registration to contribute to the payment of any debt or liability of the company. This liability is, of course, preserved only in relation to debts and liabilities

contracted by the company prior to registration under the Act (§ 333).

The effect of registration under the Act of 1929 in the cases considered is to render the company in question subject to the provisions of that Act as if it had been originally formed under it, with, however, certain modifications, notably that Table A does not apply to the company unless adopted by special resolution, and shares need not be numbered (*ibid.*).

SYNOPSIS OF CHAPTER III.

THE MEMORANDUM OF ASSOCIATION.

§ 1.—THE FUNCTION AND EFFECT OF THE MEMORANDUM.

2.—THE CONTENTS OF THE MEMORANDUM.

- (a) The Name of the Company.
- (b) The Domicil.
- (c) The Objects Clause.
- (d) Declaration of Limited Liability.
 - (1) Unlimited Liability of Directors.
 - (2) Liability of Shareholders of Bank for note issue.
 - (3) Liability of existing members where statutory minimum is not maintained.
- (e) The Capital Clause.
- (f) The Association Clause.

3.—ALTERATIONS IN MEMORANDUM.

- (a) The Name.
- (b) The Domicil.
- (c) The Objects Clause.
- (d) Limited Liability.
- (e) The Capital Clause.

CHAPTER III.

THE MEMORANDUM OF ASSOCIATION.

§ 1.—The Function and Effect of the Memorandum.

The Memorandum of Association is of supreme importance in determining the powers of a company, and, in this respect, is similar to the Statute which determines the powers of a Statutory Company, and the Charter in the case of a Chartered Company. The *raison d'être* of a company is not only defined but also confined by the Memorandum; it not only shows the object of its formation, but also the utmost possible scope of its operation.

The effect of the Memorandum when registered is to bind to the observance of its provisions not only the signatories, but also the company and any persons who may become members, as if the Memorandum had been signed and sealed by each member, and contained covenants on the part of each member, to observe all the provisions thereof (§ 20 (1)).

All money payable by any member to the company under the Memorandum is a debt due from him to the company, and in England is of the nature of a specialty debt (§ 20 (2)).

§ 2.—The Contents of the Memorandum.

The Memorandum of Association of a company limited by shares must state—

- (a) The NAME of the company with “ Limited ” as the last word thereof.
- (b) The DOMICIL of the company, *i.e.*, whether England (which includes Wales) or Scotland.
- (c) The OBJECTS of the company.
- (d) That the LIABILITY of members IS LIMITED.
- (e) The CAPITAL and its DIVISION INTO SHARES of fixed amount.

The Memorandum concludes with a declaration of association wherein the subscribers to the Memorandum sign their names, and state their respective addresses and descriptions, and state opposite to their names the number of shares they respectively agree to take (§ 2).

The Memorandum must be stamped with a deed stamp and the signatories must sign in the presence of at least one witness who must attest the signature (§ 3).

A company must, on being so required by any member, send to him a copy of the Memorandum and of the Articles, if any, and a copy of any Act of Parliament which alters the Memorandum, subject to payment, in the case of a copy of the Memorandum and of the Articles, of one shilling or such less sum as the company may prescribe, and, in the case of a copy of an Act, of such sum not exceeding the published price thereof as the company may require. If a company makes default in complying, the company and every officer of the company who is in default is liable for each offence to a fine not exceeding one pound (§ 23).

Where an alteration is made in the Memorandum of a company, every copy of the Memorandum issued after the date of the alteration must be in accordance with the alteration. If, where any such alteration has been made, the company at any time after the date of the alteration issues any copies of the Memorandum which are not in accordance with the alteration, it is liable to a fine not exceeding one pound for each copy so issued, and every officer of the company who is in default is liable to the like penalty (§ 24).

(a) The Name of the Company.

No company can be registered by a name which—

- (a) is IDENTICAL with that by which a company in existence is already registered, or so NEARLY RESEMBLES that name as to be calculated to deceive, except where the company in existence is in the course of being dissolved and signifies its consent in such manner as the registrar requires; or
- (b) contains the words “Chamber of Commerce,” unless the company is a company which is to be registered under a licence granted by the Board of Trade (*see* Chap. II, § 6), without the addition of the word “Limited” to its name; or
- (c) contains the words “Building Society.”

Except with the consent of the Board of Trade no company can be registered by a name which—

- (a) contains the words “Royal” or “Imperial” or in the opinion of the registrar suggests, or is calculated to suggest, the patronage of His Majesty or of any member of the Royal Family or connection with His Majesty’s Government or any department thereof; or

- (b) contains the words "Municipal" or "Chartered," or in the opinion of the registrar suggests, or is calculated to suggest connection with any municipality or other local authority, or with any society or body incorporated by Royal Charter; or
- (c) contains the word "Co-operative" (§ 17).

A company cannot be registered with a name resembling that of an existing company even though it is the name of some person prominently connected with the company to be registered (*Madame Tussaud & Sons v. Tussaud* (1890), 44 Ch. D. 678). The restriction also precludes the adoption of a name which is practically identical with that of a well-known foreign company trading in this country.

An English company was formed specifically to prevent a French company from registering in England in its own name. The French company had no agency in England but its cars were well-known and used there. The Court ordered the English registration of the name to be struck out of the register, and the company was ordered to change its name or wind up (*Société Panhard et Levassor v. Panhard Levassor Motor Co., Ltd.* (1901), 2 Ch. 513).

The word "Limited" must be written in full in the Memorandum; but the company can use any reasonable abbreviation, e.g., "Ltd." or "Lim." in daily transactions, e.g., on note paper.

By § 93 (1) of the Act, every company must keep its name painted or affixed on the outside of every office or place in which its business is carried on in a conspicuous position in letters easily legible.

The improper omission of any part of the name, as *e.g.*, the word "Limited" from the name of the company so painted or affixed on the outside of every office or place of business of the company, renders every officer knowingly and wilfully permitting the default liable to a penalty of five pounds a day (§ 93 (2), § 365). Conversely, if any person or persons trade or carry on business under any name or title of which "Limited" or any contraction or limitation of that word is the last word, that person or those persons are, unless duly incorporated with limited liability, liable to a fine not exceeding five pounds for every day upon which that name or title has been used (§ 364).

The formation and constitution of Building and Co-operative Societies are separately provided for under Acts specially applicable.

The position of companies incorporated as Chambers of Commerce has already been referred to (*see* Chap. II, § 6). It must be borne in mind that such bodies fulfil important functions, and the unrestricted use of the name by companies registered in the ordinary way would be calculated to mislead.

(b) *The Domicil.*

The Memorandum does not show the address of the registered office, but merely the domicile of the company, *i.e.*, that part of Great Britain, whether England or Scotland, in which the registered office is to be situate. Notice of the exact situation of the registered office has to be filed with the Registrar after incorporation, but it can be changed from time to time if desired, so long as it is not taken outside the limits of the domicile shown by the Memorandum.

A company registered in Scotland and carrying on business both in that country and in England cannot be wound up by the English Courts (*Scottish Joint Stock Trust* (1900), W.N. 114).

(c) The Objects Clause.

In view of the importance of the objects clause, which both DEFINES AND CONFINES the scope of the company's powers, it is usual for this to be drawn in the widest possible terms; and this is particularly important since the objects clause can only be altered in a limited manner and subject to confirmation by the Court as provided by the Act.

It is, therefore, most necessary to frame the objects of the company with extreme care. They should be set out with the greatest fullness, and include everything which may be required to enable the company to carry on its business. The objects should be explicitly stated, since though it may be intended that certain powers be included by implication, it may be held when the issue is raised that they are not so included, and that acts which have been done by the directors under the impression that they were within the scope of the company's powers are in reality *ultra vires* and void. Acts which are outside the ambit of the objects of a company cannot bind it even though there be a purported ratification by all the members (*Ashbury Railway Carriage Co., Ltd., v. Riche* (1875), L.R. 7 H.L. 653).

It is generally advisable to include in the Memorandum the following objects:—

- (1) To carry on other businesses in addition to its principal business.
- (2) To acquire any business similar to its own business.

- (3) To enter into any agreement for sharing profits with persons or companies carrying on separate businesses.
- (4) To acquire shares in companies working similar businesses.
- (5) To promote other companies.
- (6) To lend money and give guarantees.
- (7) To borrow money on debentures or otherwise.
- (8) To draw, make, accept, indorse, discount and issue notes, bills of exchange, and other negotiable or transferable instruments.
- (9) To sell and dispose of the undertaking of the company for shares, debentures, or securities of any other company having objects altogether or in part similar to its own.
- (10) To amalgamate or enter into partnership with any other company or body of persons.

The common practice of including a power such as "to do all other such things as are incidental or conducive to the attainment of the above objects" will not necessarily confer powers not otherwise specifically mentioned; such a clause will only render valid operations relative to the business for which powers have been taken, and will not cover any acts relating to an entirely new business (*London Financial Association v. Kelk* (1884), 26 Ch. D. 107).

Certain powers cannot be taken in the objects clause, *e.g.*, a shipping company cannot take powers to run under a foreign flag; a company cannot take power to carry on the business of Life, Fire, Accident, Employers' Liability, or Bond Investment Insurance, unless an office copy of the certificate of lodgment of the requisite deposits with the Accountant-General of the Chancery Division of the High Court of Justice

is produced to the Registrar (Assurance Companies Act, 1909, § 2; Industrial Assurance Act, 1923).

A company may now take power to carry on the business of dentistry and objects ancillary thereto, but a majority of the directors and all the operating staff must be registered dentists, otherwise the company cannot function (Dentists Act, 1921, § 5).

Power cannot be taken to carry on an illegal business nor must the objects be blasphemous (*Bowman v. Secular Society* (1917), A.C. 406).

The Memorandum being the test as to what matters are *ultra vires* the company, it follows that the capital of the company can only be employed in carrying out the lawful objects of the company. In the INTERPRETATION of the Memorandum, certain settled RULES OF CONSTRUCTION are applied by the Court, viz. :—

- (a) the document must be read as a whole ;
- (b) the words must have their ordinary signification ;
- (c) technical words are to be read in their technical sense ; and
- (d) the words used must be read with due reference to the subject matter.

The Memorandum is to be read fairly, and not so as to make *ultra vires*, if it is otherwise unobjectionable, a transaction contemplated or accomplished by the company. There have, at different times, been decisions showing where the employment of the capital on objects not expressly provided for by the Memorandum may still, by implication, be considered *intra vires* as being incidental to or consequential upon the main objects, and reasonably necessary for effecting them ; while other decisions have shown

that certain transactions, though obviously for the benefit of the company, must be held to be *ultra vires* because they are not provided for in the objects clause. The following have been held *intra vires* :—

A company formed to work a patent, expending its funds in purchasing the patent (*Leifchild's Case* (1865), 1 Eq. 231).

An hotel company letting off temporarily part of its premises not wanted for the purposes of its business (*Simpson v. Westminster Palace Hotel Co.* (1860), 8 H.L.C. 712).

An expenditure by a company carrying on the business of chemical manufacturers, of £100,000 as subscriptions to institutions for furthering scientific education and research from which the company would benefit (*Evans v. Brunner, Mond & Co.* (1921), 1 Ch. 359).

A trading company has an implied power to borrow money for the purposes of its business (*General Auction Estate Co. v. Smith* (1891), 3 Ch. 432); and to sell land (*Kingsbury Collieries* (1907), 2 Ch. 259).

A railway company has power to let as workshops, etc., arches upon which the railway has been constructed (*Foster v. London, Chatham & Dover Rly.* (1895), 1 Q.B. 711).

A trading company may give its employees a bonus in addition to wages (*Hampson v. Price's Patent Candle Co.* (1876), 45 L.J. Ch. 437); it may grant pensions to retiring officers or servants (*Cyclists' Touring Club v. Hopkinson* (1910), 1 Ch. 179); or grant a pension to the widow of a deceased manager (*Henderson v. Bank of Australasia* (1889), 40 Ch. D. 170).

The following have, on the other hand, been held *ultra vires* :—

A railway company proposing to apply its funds towards promoting a Bill in Parliament to obtain powers to improve the navigation of a river, although this would be conducive to the prosperity of the company (*Munt v. Shrewsbury Railway Co.* (1851), 13 Beav. 1).

A railway company proposing to work coal mines, and dealing in coal for profit (*Att.-Gen. v. G. N. Railway Co.* (1860), 1 Dr. and Sm. 154).

The purchase of a railway concession abroad by a company formed to make and sell railway carriages (*Ashbury Railway Carriage Co. v. Riche* (1875), L.R. 7 H.L. 653).

A railway company may not guarantee the profits of a steamboat company (*Colman v. Eastern Counties Railway Co.* (1846), 10 Beav. 1).

A company must not expend money in supporting an action not brought by itself (*Kernaghan v. Williams* (1868), 6 Eq. 228).

It is *ultra vires* for a company, without special power in its constitution, to take over the undertaking of another company, or to enter into a partnership or amalgamation or to promote another company, but the Act allows the alteration of the Memorandum to take those powers (§ 5—see Chap. III, § 3 (c)).

Certain matters are altogether *ultra vires*, and cannot be made *intra vires* even by taking power in the Memorandum, e.g., a company purchasing its own shares (*Trevor v. Whitworth* (1887), 12 App. Cas. 409), or purporting to act as a solicitor (Solicitors Act, 1934).

Any acts of the directors which are *ultra vires* the company are not binding on the company, and such acts CANNOT BE RATIFIED even by a unanimous resolution of the shareholders, because to do so would amount to an alteration of the Memorandum, which can only be effected in the manner authorised by Statute.

A person entering into a contract with a company, which is outside the powers of the company, gets no rights under it ; but the company may retain property paid for by it or recover money lent by it thereunder (*Great Eastern Railway v. Turner*, (1873), 8 Ch. App. 149 ; *Coltman v. Coltman* (1882), 19 Ch. D. 65), and may sue for damage done to property, *e.g.*, where a company without power in its Memorandum erected telephone wires in Guernsey, the lack of power alone did not prevent the company from suing for damages persons who cut down the wires (*National Telephone Co. v. Constables of St. Peter Port* (1900), A.C. 317, 321).

Persons dealing with a company are deemed to have notice of the provisions of the Memorandum, and to have notice of the limitation of the company's powers therein contained ; and if they do not ascertain the extent of such limitation, they enter into dealings with the company at their own risk (*Royal British Bank v. Turquand* (1856), 25 L.J. Q.B. 317).

General powers taken in the Memorandum will not be merely ancillary to the principal objects of the company if the objects clause contains a declaration that they are not to be so construed (*Cotman v. Brougham* (1918), A.C. 514).

If the main purpose for which the company was formed has ceased to exist, it cannot promote subsidiary objects to primary rank with a view to

continuing business, and the only course is for the company to go into liquidation. This was settled by the decision in *re Amalgamated Syndicate* ((1897), 2 Ch. 600).

This company had been formed to erect stands for the purpose of enabling the public to view the late Queen Victoria's Diamond Jubilee Procession. The main object having been fulfilled, the company proceeded to carry on business as house agents, power being contained in its Memorandum. Since such power was only incidental to the main object of the company, which had now gone, the company was ordered to be wound up.

(d) Declaration of Limited Liability.

In all cases of companies limited by shares, the Memorandum must state that the liability of the members is limited. This means that the holder of shares can only be called upon at any time to pay to the company the amount for the time being unpaid on shares held by him; *e.g.*, if A. holds 10 shares of £1 each upon which he has paid calls for 15s. per share, his liability is limited to the unpaid amount of 5s. per share held. If he has paid the full nominal value of the share, his liability is at an end (§ 157).

When a member of the company transfers his shares, the transferee takes the existing liability upon them, but the transferor remains liable if the company goes into liquidation within one year of the transfer, if the then holders of the shares are unable to satisfy the amount unpaid on them and there are liabilities of the company unpaid which existed when the transferor was a member (§ 157).

§ 2.] THE MEMORANDUM OF ASSOCIATION.

(1)—UNLIMITED LIABILITY OF DIRECTORS.

It is permissible for the Memorandum to provide for unlimited liability of directors or managers or of the managing director (§ 146 (1)), despite the fact that the liability of the members generally is limited.

This unlimited liability comes to an end at the expiration of one year from the time the director ceases to hold office, and does not extend to liabilities of the company contracted after he ceases to be a director.

Unless the Articles of the company provide otherwise, a director or manager is not liable to make a contribution in respect of his unlimited liability, unless the Court deems it necessary to require a contribution in order to satisfy the debts and liabilities of the company, and the costs, charges and expenses of the winding-up (§ 157).

In a limited company in which the liability of a director or manager is unlimited, the directors or managers of the company, if any, and the member who proposes a person for election or appointment to the office of director or manager, must add to that proposal a statement that the liability of the person holding that office will be unlimited, and the promoters, directors, managers, and secretary, if any, of the company, or one of them, must, before the person accepts the office or acts therein, give him notice in writing that his liability will be unlimited.

If any director, manager, or proposer makes default in adding such a statement, or if any promoter, director, manager, or secretary makes default in giving such a notice, he is liable to a fine not exceeding one hundred pounds, and is also liable for any damage which the person so elected or appointed may sustain from the default, but the liability of the person elected or appointed is not affected by the default (§ 146 (2) (3)).

The liability of directors may be made unlimited by altering the Memorandum (*see below*, § 3 (d)).

Directors may also incur unlimited liability for the debts and liabilities of the company where in the course of liquidation it appears to the Court that the business of the company has been carried on with intent to defraud creditors or for any fraudulent purpose. In such a case, the Court may declare that any of the directors, whether past or present, who were knowingly a party to the carrying on of the business in this manner, shall be personally responsible for all or any of the liabilities of the company. The Court may, in respect of any such director, order that he shall not, without the leave of the Court, be a director of or in any way directly or indirectly, be concerned in or take part in the management of any company for a period not exceeding five years. If any person acts in contravention of any such order he is liable on conviction on indictment to imprisonment for a term not exceeding two years, or on summary conviction for a term not exceeding six months, or to a fine not exceeding £500, or to both such imprisonment and fine (§ 275).

It has been held that a company, carrying on business and incurring debts where to the knowledge of the directors there is no reasonable prospect of the debts being paid may, in general, be properly inferred to be carrying on business with intent to defraud creditors for the above purposes, and that the declaration of the Court of liability of a director should state the amount for which he is liable (*Leitch Bros. Ltd.* (1932), 2 Ch. 71). It would seem from this case that the Court in its discretion may make an order whereby the director's liability is not necessarily limited to the amount of the debts due to creditors held to be defrauded within the meaning of the section.

(2)—LIABILITY OF SHAREHOLDERS OF BANK FOR NOTE ISSUE.

Where a company registered under the Companies Act is a bank having an issue of bank notes, the liability of members is unlimited in respect of the note issue (§ 360). This section has, however, ceased to have any practical effect in England, as all banks (other than the Bank of England which is not subject to the Companies Act) previously having a note issue have now from various causes ceased to enjoy this privilege.

(3)—LIABILITY OF EXISTING MEMBERS WHERE STATUTORY MINIMUM IS NOT MAINTAINED

If at any time the number of members of a company is reduced, in the case of a private company, below two, or, in the case of any other company, below seven, and it carries on business for more than six months while the number is so reduced, every person who is a member of the company during the time that it so carries on business after those six months, and is cognisant of the fact that it is carrying on business with fewer than two members or seven members, as the case may be, is SEVERALLY LIABLE FOR THE PAYMENT OF THE WHOLE DEBTS of the company contracted during that time, and may be severally sued therefor (§ 28).

If the number of members is reduced in this way it is ground for the company concerned being wound up by the Court (§ 168).

(c) The Capital Clause.

The capital clause of the company states the amount of capital with which the company is registered, divided into shares of a certain fixed amount. It cannot issue more shares than are authorised by the Memorandum for the time being.

Although it is not essential, it is usual to provide in the capital clause that shares may be issued with preferred or deferred rights. It is, however, possible for a company to take this power at any time unless the Memorandum provides that all shares should rank equally (*Andrews v. Gas Meter Co.* (1897), 1 Ch. 361).

Where the rights and privileges of any class of shares are defined in the Memorandum, they cannot be varied unless the Memorandum itself gives power to do so, except with the sanction of the Court under § 153 of the Act. It is therefore advisable to define these rights, etc., in the Articles, which can be altered as stated in Chap. IV, § 4.

(f) The Association Clause.

The association clause states—

“We, the several persons whose names and addresses are subscribed, are desirous of being formed into a company in pursuance of this Memorandum of Association, and we respectively agree to take the number of shares in the capital of the company set opposite to our respective names.”

Then follows the names, addresses and descriptions of the subscribers, and the number of shares taken by each subscriber. The latter, like the signatures, must be written by the subscribers personally, or by their agents duly authorised so to do.

The signatures must be attested by a witness or witnesses. Each subscriber must take at least one share.

An infant may subscribe (*Laxon & Co.* (1892), 3 Ch. 555), but it must be borne in mind that his contract to take the shares is voidable, i.e., he can repudiate all liability if he so desires, although he

cannot recover any money paid for the shares unless the shares never had any value (*Steinberg v. Scala (Leeds), Ltd.* (1923), 2 Ch. 452.)

§ 3.—Alterations in Memorandum.

The terms of the Memorandum can only be altered in accordance with the express provisions of the Act (§ 4).

(a) The Name.

A company may change its name after registration by passing a SPECIAL RESOLUTION and obtaining the CONSENT OF THE BOARD OF TRADE thereto. As to the meaning of "Special Resolution," see Chap. VIII, § 5.

A company may change its name with the sanction of the Registrar, if through inadvertence or otherwise, it has been registered (except with the consent of a company in liquidation) by a name which is identical with that by which a company in existence is previously registered or which so nearly resembles that name as to be calculated to deceive.

Where a licence granted by the Board of Trade to a company, the name of which contains the words "Chamber of Commerce," to dispense with the word limited, is revoked, the company must within a period of six weeks from the date of the revocation, or such longer period as the Board of Trade may think fit to allow, change its name to a name which does not contain those words. If a company makes default in complying with this requirement it is liable to a fine not exceeding fifty pounds for every day during which the default continues.

Where a company changes its name, the Registrar enters the new name on the register in place of the

former name, and issues a certificate of incorporation altered to meet the circumstances of the case.

The change of name does not affect any rights or obligations of the company, or render defective any legal proceedings by or against the company, and any legal proceedings that might have been continued or commenced against it by its former name may be continued or commenced against it by its new name (§ 19.)

The Board will not sanction a change which points to a variation of the principal objects of the company, and may require evidence to be given that no alteration of the principal business of the company is intended.

(b) The Domicil.

The DOMICIL of the company could be altered by obtaining a special Act of Parliament, but if it is desired to alter the domicil, the practical method of doing so is to reconstruct the company.

The SITUATION OF THE REGISTERED OFFICE may, however, be changed at the will of the company, provided it remains within the country registered as the domicil of the company. Notice of change must be given to the Registrar within 28 days of the change (§ 92).

(c) The Objects Clause.

A company may, under § 5 of the Act by special resolution, alter the provisions of its Memorandum with respect to the objects of the company, so far as may be required to enable it—

- (a) to carry on its business more economically or more efficiently ; or
- (b) to attain its main purpose by new or improved means ; or

- (c) to enlarge or change the local area of its operations; or
- (d) to carry on some business which under existing circumstances may conveniently or advantageously be combined with the business of the company; or
- (e) to restrict or abandon any of the objects specified in the Memorandum; or
- (f) to sell or dispose of the whole or any part of the undertaking of the company; or
- (g) to amalgamate with any other company or body of persons.

The alteration does not take effect until, and except in so far as, it is confirmed on petition by the Court.

Before confirming the alteration the Court must be satisfied-

- (a) that sufficient notice has been given to every holder of debentures of the company, and to any persons or class of persons whose interests will, in the opinion of the Court, be affected by the alteration; and
- (b) that, with respect to every creditor who in the opinion of the Court is entitled to object and who signifies his objection in manner directed by the Court, either his consent to the alteration has been obtained or his debt or claim has been discharged or has been determined, or has been secured to the satisfaction of the Court.

The Court may, however, in the case of any person or class, for special reasons, dispense with the requirement as to notice.

The Court may make an order confirming the alteration either wholly or in part, and on such terms and conditions as it thinks fit.

The Court must, in exercising its discretion as to the confirmation or rejection of a proposed alteration, have regard to the rights and interests of the members of the company or of any class of them, as well as to the rights and interests of the creditors, and may, if it thinks fit, adjourn the proceedings in order that an arrangement may be made to the satisfaction of the Court for the purchase of the interests of dissentient members, and may give such directions and make such orders as it may think expedient for facilitating or carrying into effect any such arrangement; but no part of the capital of the company can be expended in any such purchase.

An office copy of the order confirming the alteration, together with a printed copy of the Memorandum as altered, must, within fifteen days from the date of the order, be delivered by the company to the Registrar of Companies, who must register the copy so delivered and certify the registration under his hand. The certificate is conclusive evidence that all the requirements of the Act with respect to the alteration and the confirmation thereof have been complied with, and thenceforth the Memorandum as so altered is the Memorandum of the company.

The Court may by order at any time extend the time for the delivery of documents to the Registrar under § 5 for such period as the Court may think proper.

If a company makes default in delivering to the Registrar of Companies any document required by this section to be delivered to him, the company is liable to a fine not exceeding ten pounds for every day during which the default continues (§ 5 (7)).

It is somewhat anomalous that while the original Memorandum need not be printed, yet where alterations

have been effected to the objects clause, a printed copy is required.

The alteration is sanctioned by the Court having jurisdiction to wind up the company, *i.e.*, the High Court (which has jurisdiction in all cases), or either of the Palatine Courts if the registered office is situated within their jurisdiction; or if the paid-up capital does not exceed £10,000, the County Court within the jurisdiction of which the registered office of the company is situated (§§ 163, 380).

The Palatine Courts are the Chancery Court of the County Palatine of Lancaster and the Chancery Court of the County Palatine of Durham.

The petition may be presented to any of the Judges of the Chancery Division or to the Judge to whom winding-up business is assigned (*Essex and Suffolk Equitable Insurance Society* (1909), W.N. 102; *Mining Shares Investment Co.* (1893), 2 Ch. 660).

The Court will not allow an alteration which will completely change the business of the company (*Cyclists' Touring Club* (1907), 1 Ch. 269; but it will, where justified by special circumstances, allow the addition of a business differing in character from the existing business to be combined therewith (*re Bolsom Brothers Ltd.* (1935), 1 Ch. 413). In *re Patent Tyre Co.* ((1923), 2 Ch. 222), the Court held that the company's managers and shareholders were the best judges as to whether a new business was one which could be conveniently and advantageously combined with its existing business.

The Court will not authorise the addition of a considerable number of general powers not intended to be exercised by the company (*D. & D. H. Fraser* (1903), 19 T.L.R. 364).

The Court has sanctioned an alteration of the objects of a company, limited by guarantee, which removed a clause prohibiting the payment of remuneration to members of the governing body, where the work had increased to such an extent that the governing body were unable to give the necessary amount of time to it without some remuneration for their services, and the Company in general meeting approved an alteration of the Memorandum which would enable the appropriate payments to be made. The Court of Appeal considered that the alteration was to enable the company to carry on its business more economically or efficiently (*Scientific Poultry Breeders' Association* (1933), (Ch. 227).

The Court may confirm the resolution in entirety or in part only (*Spiers & Pond* (1895), W.N. 135).

The Court will consider whether the proposed alteration is fair and equitable as between the various members of the company (*Jewish Colonial Trust* (1908), 2 Ch. 287), and whilst at one time the possible scope of the alteration as provided for in the Act was interpreted somewhat strictly, the present tendency appears to be to have regard to the wishes of the shareholders within the scope of the section, particularly where the requisite resolution has been passed by an overwhelming majority (*Parent Tyre Co.* (1923), 2 Ch. 222).

On the petition for confirmation the interests of persons who are members or creditors of the company may be urged for or against the alteration; but no objection to the alteration will be received from strangers to the company (e.g., trade competitors) who claim that they will be prejudiced by the variation in the company's powers (*In re Hearts of Oak Life & General Assurance Co.* (1920), 1 Ch. 544).

The Court may make it a condition of confirming the alteration that the company changes its name, *e.g.*, where the name suggests a particular local interest and operation and the company is extending its activities to other localities (*Indian Mechanical Gold Extracting Co.* (1891), 3 Ch. 538).

A company formed originally with a deed of settlement can, if it registers under the Act, change the deed of settlement for a Memorandum and Articles by a similar method (§ 334); and in such a case confirmation by the Court is necessary even though there is no contemplated change in the objects of the company (*In re Braintree and Rocking Gas Co.* (1920), 2 Ch. 12).

(d) **Limited Liability.**

The clause limiting the liability of the members does not admit of alteration so as to render unlimited the liability of the members generally. The liability of directors or managers or of any managing director may be made unlimited by the original Memorandum (§ 146). Moreover, if authorised by the Articles a company may, by special resolution, alter its Memorandum so as to render unlimited the liability of its directors, or managers, or of any managing director. Upon the passing of any such special resolution the provisions thereof are as valid as if they had been originally contained in the Memorandum (§ 147). (*See* Chap. III, § 2 (d) (2).)

Every copy of the Memorandum issued subsequently must embody the alteration made (§ 24).

Notwithstanding anything in the Memorandum or Articles of a company, no member of the company is bound by an alteration made in the Memorandum or Articles after the date on which he became a member,

if and so far as the alteration requires him to take or subscribe for more shares than the number held by him at the date on which the alteration is made, or in any way increases his liability as at that date to contribute to the share capital of, or otherwise to pay money to, the company ; but this does not apply in any case where the member agrees in writing, either before or after the alteration is made, to be bound thereby (§ 22).

(e) The Capital Clause.

The capital clause can be altered as provided by the Memorandum itself, or as authorised by Statute.

Thus the rights conferred by the Memorandum on particular classes of shareholders can be varied by the express terms of the Memorandum, or by reorganisation or arrangement under § 153 of the Act.

The capital may also be increased, reduced, consolidated, subdivided or cancelled in accordance with the provisions of the Act. These points are fully dealt with in Chapter V.

An unlimited company may also re-register as a limited company, but this will not affect any liability incurred before the registration (§ 16). A company so registered with limited liability may simultaneously with the resolution for such registration provide for a reserve liability with or without an increase of the nominal amount of each share (§ 53).

SYNOPSIS OF CHAPTER IV.

THE ARTICLES.

1 — THE FUNCTION AND EFFECT OF THE ARTICLES

2 — THE CONTENTS OF THE ARTICLES

3 — TABLE A

4 — ALTERATION OF THE ARTICLES.

CHAPTER IV.

THE ARTICLES.

§ 1.—The Function and Effect of the Articles.

The Articles of a company are subordinate to and controlled by the Memorandum. The Memorandum contains the fundamental conditions on which alone the company is granted incorporation. The Articles are the INTERNAL REGULATIONS of the company, and over these the members have full control, and may by special resolution alter them from time to time as they think fit, so long as they keep within the limits marked out by the Companies Act and the Memorandum.

Hence any regulations that go beyond the company's proper sphere of action will be inoperative, and anything done in accordance with such regulations will be void. Thus any provisions giving a company power to purchase its own shares (*Trevor v. Whitworth* (1888), 12 App. Cas. 409), or to pay dividends out of capital (*Guinness v. Land Corporation of Ireland* (1882), 22 Ch. D. 349), or to prohibit the members from applying for a winding-up order (*Peveril Gold Mines* (1898), 1 Ch. 122), are invalid and ineffectual.

The Articles, however, though they cannot alter or contradict the Memorandum, may be used to explain an ambiguity existing in the Memorandum (*Phœnix Bessemer Steel Co.* (1875), 32 L.T. 854; *London Financial Association v. Kelk* (1884), 26 Ch. D. 107).

The Articles form a COVENANT BETWEEN THE MEMBERS AND THE COMPANY, and by them the members are all bound to the company, and their rights *inter se* regulated.

It is declared by § 20 of the Act to which reference has already been made in connection with the Memorandum, that the Articles of a company when registered BIND THE COMPANY AND THE MEMBERS thereof as if those Articles had been signed and sealed by each member and contained covenants on the part of each member to observe all the provisions of the Articles. The result is, so far as the terms of the Articles are capable of producing a contractual relationship, to bind the company to its members (*Oakbank Oil Co. v. Crum* (1883), 8 App. Ca. 65), the members to the company (*Salmon v. Quin & Axtens Ltd.* (1909), 1 Ch. 311), and the members to each other (*Eley v. Positive Assurance Co.* (1876), 1 Ex. D. 20, 88).

The contract contained in the Articles, however, cannot be enforced by a person who is not a shareholder, or even by a shareholder except so far as it affects his position as a member of the company; thus a provision in the regulations that the preliminary expenses shall be paid by the company to the promoter gives him no right of action against the company (*Rotherham Chemical Co.* (1883), 25 Ch. D. 103).

Where the Articles of a company contained a clause providing that A. should be employed *for life* as solicitor to the company and whilst so employed he became a shareholder, no action lay for breach of contract upon the company discontinuing his employment as solicitor (*Eley v. Positive Assurance Co.*, *supra*), since the provision did not benefit

him in his capacity of a member, and the Articles do not bind the company or its members to third parties.

While the Articles cannot create a contract between the company and any person other than a member in his capacity as member, yet they may indicate the basis of terms upon which contracts may be made by the company, and then if certain such a contract is entered into, whether with a member of the company or of the general public, the conditions stated in the Articles will be tacitly adopted by that contract, unless expressly negatived or varied by the terms of the contract itself.

The most usual case in which the provisions of the Articles will indicate the terms upon which the company has contracted is in connection with directors. If the Articles provide that directors shall be entitled to certain fees as remuneration for their services, it can legitimately be inferred that the director concerned agreed to serve on the terms stated in the Articles which are then considered to be embodied in and to form part of the contract between the company and the directors (*Swabey v. Port Darwin Co.* (1901), 1 Meg. 385; *Isaac's case* (1892), 2 Ch. 158; *New British Iron Co.* (1898), 1 Ch. 324).

In *Baring-Gould v. Sharpington Pick Syndicate* ((1899), 2 Ch. 80), it was held that the Articles of a company did not constitute an "agreement" between the company and any individual member within the meaning of § 234 of the Act, so as to deprive a member dissenting from a reconstruction scheme of the right to have the value of his interest determined by arbitration. The statutory right given by that section cannot be overborne by provisions in the Articles purporting to fix the price at which dissentients may claim to be bought out. (*See also* Chap. XIV, § 3.)

Where the directors have committed actions in respect of which they can be sued, individual members cannot take proceedings against them. In *Foss v. Harbottle* ((1843), 2 Hare, 461), two members of an incorporated company took legal proceedings against the directors and others to compel them to make good losses sustained by the company by reason of fraudulent acts of such directors. The Court held that as the actions were capable of confirmation by the majority, it was for the majority to complain or to condone as they might think best. It is therefore the company and not individual members who should sue for a breach of the regulations of the company.

Where the directors have acted *ultra vires* but the act performed is *intra vires* the company, the unanimous agreement of all the shareholders, even though such assent is not exhibited formally by a special resolution at a meeting of the shareholders, will operate to ratify the irregular transaction (*Parker & Cooper, Ltd. v. Reading & James* (1926), 1 Ch. 975).

Though persons dealing with a company are presumed to know the provisions of the Articles, yet if there be a breach of those provisions, they are not affected thereby, provided the matter was within the powers of the company as specified by the Memorandum, and the person dealing with the company had no notice of the breach. IT IS NO PART OF THE DUTY OF AN OUTSIDER TO SEE THAT THE COMPANY CARRIES OUT ITS OWN REGULATIONS (*Royal British Bank v. Turquand* (1856), 25 L.J. Q.B. 317). But if a person is AWARE of the non-observance of the provisions contained in the Articles, the rule in *Royal British Bank v. Turquand* does not operate, e.g., in *Howard*

v. Patent Ivory Co. ((1888), 38 Ch. D. 156), where DIRECTORS lent money to the company in excess of its borrowing powers, the company was not liable for such excess. Similarly, a person cannot rely on the rule where special enquiry would be made by an ordinarily prudent man in view of the peculiar circumstances (*Houghton & Co. v. Nothard, Lowe & Wills* (1928), A.C. 1), or where an instrument purporting to be given by the company is a forgery (*Kreditbank Cassel v. Schenkers* (1927), 1 K.B. 826).

The rule is a matter of considerable importance to persons who have business relations with the company through its directors, and who are entitled to assume that the acts of the directors are validly performed if they are within the scope of their apparent authority. In *Duck v. The Tower Galvanising Co., Ltd.* ((1901), 2 K.B. 314), A. had formed his business (comprising assets to the value of £100 and debts to an equivalent amount) into a limited company. The Articles provided for the issue of debentures, and A. issued debentures to B. for £500 without summoning a meeting for the purpose. It was held that B. was entitled to assume that the debentures had been validly issued, and he was able to obtain priority over the other creditors. (*See also* Chapter X, § 8.)

When a bill of exchange is drawn by a branch manager of a limited company, purporting to be on behalf of the company, but without its express or implied authority, such bill is a forgery and is null and void, and the company can repudiate liability thereon, unless estopped by their conduct (*Kreditbank Cassel v. Schenkers, supra*).

Where the transaction is not in the ordinary course of business, or is of unusual magnitude, the persons

dealing with the company should be put upon enquiry, and the company may not be bound by acts outside the authority of the directors, *e.g.*, where the Articles contained wide powers of delegation, and a director exceeded his powers, but it was shown that the other party was in ignorance of the existence of the general power in the Articles and therefore did not rely upon it, it was held that the company was not bound, as the other party should have been put upon enquiry by the nature of the transaction (*Houghton & Co. v. Nothard, Lowe & Wills, supra*).

A third party may be affected even though the Article of which he had notice was not complete owing to irregularity in its creation, provided that the Article is such as the company could legally adopt and the third party had no notice that it had not been duly and regularly adopted. In *Muirhead v. Forth Mutual Insurance Association* ((1894), A.C.72), policies issued by the defendant company were issued "subject to the Articles," and the terms of an altered Article was endorsed thereon. The alteration had been irregularly made, but it was held that policy holders were bound thereby. (*See also* Chap. VIII, § 9, as to *ultra vires* borrowing.)

All money payable by any member of the company under the Articles (and also under the Memorandum to which reference has already been made (Chap. III, § 1)) is a debt due from him to the company, and in England is of the nature of a specialty debt (§ 20 (2)).

§ 2.—The Contents of the Articles.

The Articles must be PRINTED and divided into PARAGRAPHS NUMBERED consecutively, and must be signed by each subscriber of the Memorandum of Association in the presence of at least one witness

who must attest the signature (§ 9). They must be stamped with a ten shilling deed stamp (§ 9), and filed with the Memorandum when the company is registered (§ 6).

In the case of companies limited by shares, where no Articles are registered, Table A will apply; and if Articles are registered, Table A will still apply so far as it is not excluded or modified by the Articles so filed (§ 8). An Article in Table A cannot be excluded by implication (*Fisher v. Black and White Publishing Co.* (1901), 1 Ch. 174).

Table A does not apply to companies limited by guarantee or to unlimited companies, and such Companies must therefore file special Articles (§ 6) which may, however, take the form of the clauses of Table A so far as they are applicable.

The First Schedule to the Act includes Tables C, D and E, being model sets of Articles for companies limited by guarantee and not having a share capital, those limited by guarantee and having a share capital, and unlimited companies respectively, but these are for guidance only and are not invested with the same automatic application as is Table A. Companies other than those limited by shares may adopt such provisions of the appropriate Table as may be desirable, but such provisions must be set out in the Articles and cannot be adopted by reference.

In the case of an unlimited company, the Articles, if the company has a share capital, must state the amount of such capital with which the company proposes to be registered; if the company has not a share capital, and also in the case of guarantee companies, the Articles must state the number of members with which the company proposes to be registered (§ 7). A private company must file Articles containing

the provisions requisite to make it a private company. Such companies usually also exclude some of the clauses of Table A.

The Articles are void so far as they are inconsistent with or repugnant to any of the provisions of the Act (*Welton v. Saffery* (1897), App. Cas. 299; *Newton v. Birmingham Small Arms Co.* (1906), 2 Ch. 378), but an Article will not be void merely because it is virtually a repetition of a clause in Table A (*Lock v. Queensland Investment Co.* (1896), A.C. 461).

The Articles will make provision for the manner in which the administration of the company is to be carried on, and will have particular reference to such matters as the making of calls, forfeiture of shares, increase and reduction of capital, directors' remuneration and qualification, dividends and reserves, accounts and audit.

Reference should be made to Table A, which will be found printed in the Appendix.

§ 3.—Table A.

Articles of Association may adopt all or any of the regulations contained in Table A.

In the case of a company limited by shares, if Articles are not registered, or if Articles are registered, in so far as the Articles do not exclude or modify the regulations contained in Table A, those regulations, so far as applicable, are the regulations of the company in the same manner and to the same extent as if they were contained in duly registered Articles (§ 8).

Where no special Articles are adopted and Table A will apply in its entirety, the Memorandum must be endorsed "registered without Articles of Association."

This cannot be done in the case of a private company, since such a company must register Articles complying with § 26 of the Act.

Sometimes a company will exclude the operation of Table A entirely, registering an entire set of Articles suitable to its own requirements ; but it is common for a company to register special Articles for such purposes as it may require, leaving Table A to apply to those matters in respect of which it has not registered its own regulations, and excluding those clauses of Table A incompatible with its special Articles.

As already stated in Chap. I, § 2 (*g*), the Table A applying to limited companies at the present time is either the Table contained in the First Schedule to the Companies Act, 1862, or the Table prescribed by the Board of Trade on the 1st October, 1906 ; the Table contained in the First Schedule to the Companies Act, 1908, or that contained in the First Schedule to the Companies Act, 1929, according to the date of incorporation of the company. A company to which an earlier Table A applies can, by special resolution, adopt the new Table A.

Power is reserved to the Board of Trade to alter Table A (§ 379). The Table, so altered, must be published in the *London Gazette*.

§ 4.—Alteration of the Articles.

Subject to the provisions of the Act and to the conditions contained in its Memorandum, a company may by special resolution alter or add to its Articles.

Any alteration or addition so made in the Articles is, subject to the provisions of the Act, as valid as if originally contained therein, and is subject in like manner to alteration by special resolution (§ 10).

The terms of the Articles must be strictly adhered to, and cannot be varied except by special resolution of the company. The following cases will illustrate this :—

- (1) The Articles of a company provided that the powers of control vested in the directors could only be varied by extraordinary resolution, and that the directors could only be removed by special resolution. It was held that the directors were not bound to comply with a resolution passed by a simple majority at an ordinary general meeting for the sale of the assets (*Automatic Self-Cleansing Filter Co. v. Cunningham* (1906), 2 Ch. 34).
- (2) The Articles of a company provided that the management of the company should be entrusted to a board of directors, subject to such regulations (not inconsistent with the provisions of the Articles) as might be prescribed by the company in general meeting. Another Article provided that no resolution of the directors for certain objects should be valid if one of the directors dissented. A resolution was passed by the directors bearing on these objects from which one of the directors dissented. This resolution was afterwards confirmed by an ordinary resolution of the company. The Court of Appeal held that the confirmation was invalid, as being an attempt to alter the last-named Article by ordinary, instead of by special resolution (*Salmon v. Quin & Ardens, Ltd.* (1909), 1 Ch. 311).

An alteration of the Articles must not amount—

- (i) to an attempt to sanction an act which is *ultra vires* the company altogether, or is an illegal act ;
- (ii) to a fraud by the majority against the minority ;
- (iii) to an undue prejudice imposed on the minority unless there is some REAL ADVANTAGE ACCRUING TO THE COMPANY.

As to whether such benefit accrues, is a matter of fact for the shareholders acting *bonâ fide* and not for the Court, and the Court will not interfere unless the action of the shareholders is so unreasonable that no reasonable body of men could so act (*Shuttleworth v. Cox Brothers & Co. (Maidenhead) Ltd.* (1927), 2 K.B. 9). A power designed for the benefit of the company is not necessarily bad simply because it bears hardly on individual shareholders, *e.g.*,

After the death of the only member who held fully paid shares in a company, its Articles were altered so as to entitle it to exercise a lien over such shares in respect of sums owed by a shareholder to the company. The deceased member also held shares which were partly paid upon which he was indebted to the company for calls. The effect of the alteration was to give the company a lien over *all* his shares, but as it was for the benefit of the company the alteration was upheld (*Allen v. Gold Reefs* (1900), 1 Ch. 656).

Provisions in the Articles relating to compulsory cessation of membership, are considered in Chapter V, *post*.

In the event of the sale of the business of the company to another company, in consideration of

shares or debentures in the other company, no provision in the Articles can deprive a dissentient shareholder of his rights under § 234 of the Act (*Payne v. Cork Co.* (1900), 1 Ch. 308; *Bisgood v. Henderson's Transvaal Estates* (1908), 1 Ch. 743).

In the case of an unlimited company formed and registered under the Joint Stock Companies Acts, the power of altering Articles extends to altering any regulations relating to the amount of capital or to its distribution into shares, notwithstanding that those regulations are contained in the Memorandum (§ 319).

Where Articles have been registered, a copy of any resolution for the time being in force affecting the Articles must be embodied in or annexed to every copy of the Articles issued after the passing of the resolution (§ 118 (2)). Where special Articles have not been registered, a printed copy of any such resolution or agreement must be forwarded to any member at his request on payment of one shilling or such less sum as the company may direct (§ 118 (3)). It will be recalled that if special Articles are not registered, the provisions of Table A of the First Schedule to the Act apply to the company. Section 118 applies not only to special resolutions altering the Articles but to other forms of resolution as well as agreements by members affecting the constitution of the company. (*See* Chap. VIII, § 5 (1).)

A company cannot deprive itself of the right of alteration by a clause in the Articles, or by special contract that the Articles of the company shall not be altered (*Walker v. London Tramways Co.* (1879), 12 Ch. D. 705; *Malleson v. National Insurance Co.* (1894), 1 Ch. 200).

The Court will not rectify mistakes in the Articles, since the company always has power to vary or alter them at any time (*Evans v. Chapman* (1902), 86 L.T. 381).

A member of the company cannot be bound by any alteration made in the Articles after the date on which he became a member, if and so far as the alteration requires him to take or subscribe for more shares than the number held by him at the date on which the alteration is made, or in any way increases his liability as at that date to contribute to the share capital of, or otherwise to pay money to the company, unless he agrees in writing to be bound by the alteration either before or after it is made (§ 22).

A company can be restrained from altering its Articles for the purpose of committing a breach of contract (*British Murac Syndicate v. Alperton Rubber Co., Ltd.* (1915), 2 Ch. 186).

A printed copy of every special resolution by authority of which the Articles are altered must be filed with the Registrar of Companies within 15 days from the date upon which it was passed (§ 118).

SYNOPSIS OF CHAPTER V.

THE PROSPECTUS.

- § 1.—NATURE OF PROSPECTUS.
- 2.—REGISTRATION OF PROSPECTUS.
- 3.—STATUTORY DISCLOSURES IN PROSPECTUSES.
- 4.—REPORTS AND DOCUMENTS.
- 5.—MATERIAL CONTRACTS.
- 6.—REMEDY FOR NON-DISCLOSURE.
- 7.—REMEDIES FOR MISREPRESENTATION.
 - (a) Rescission of the Contract to take Shares.
 - (b) Damages at Common Law.
 - (c) Compensation under the Act.
- 8.—OFFERS FOR SALE.
- 9.—PROSPECTUSES OF FOREIGN COMPANIES.
- 10.—SHARE HAWKING.

CHAPTER V.

THE PROSPECTUS.

§ 1.—Nature of Prospectus.

The Act defines a prospectus as “any prospectus, notice, circular, advertisement or other INVITATION OFFERING TO THE PUBLIC FOR SUBSCRIPTION OR PURCHASE ANY SHARES OR DEBENTURES OF A COMPANY” (§ 380). In essence, therefore, a prospectus—

- (a) is a document of invitation,
- (b) is directed to the public, and
- (c) relates to shares or debentures in a company.

To constitute a prospectus it is not necessary that the invitation be extended to the public at large. It is sufficient if it be “shown to ANY PERSON AS A MEMBER OF THE PUBLIC, and as an invitation to that person to take some of the shares referred to”; but the invitee must not have been approached in any special character or capacity (*Nash v. Lynde* (1929), A.C. 158). On the other hand, an offer of shares in a new company made upon a reconstruction exclusively to the members of the existing company is not an offer to the public (*Booth v. New Afrikander Gold Mining Co., Ltd.* (1903), 1 Ch. 295); nor is an offer of shares which is confined to existing members or debenture holders of the company in which the shares are to be held (*Burrows v. Matabele Gold Reefs, &c.* (1901), 2 Ch. 23).

Whether or not an offer is to be regarded as having been made to THE PUBLIC is clearly a question of fact. The determination of this question is of considerable importance, for the law requires that in the case of a PUBLIC invitation to subscribe for or to purchase shares in a company specific disclosures must be made as to matters relating to the company. The obligation to make such disclosures (as specified in in the Fourth Schedule to the Act), arises—

- (a) where a prospectus is issued by or on behalf of a company, or by or on behalf of any person who is or has been engaged or interested in the formation of the company (§ 35); and,
- (b) in the case of any document by which an OFFER FOR SALE to the public is made of shares which were originally allotted by a company with a view to their being offered to the public (§ 38 (1)).

The provisions of these sections are further considered in §§ 3 and 8, below.

§ 2.—Registration of Prospectus.

A prospectus issued by or on behalf of a company, or in relation to an intended company, must be dated, and that date, unless the contrary is proved, is taken as the date of publication of the prospectus.

A copy of every prospectus, signed by every person who is named therein as a director or proposed director of the company, or by his agent authorised *in writing*, must be delivered to the registrar of companies for registration on or before the date of its publication, and no prospectus can be issued until a copy thereof has been so delivered for registration.

The registrar must not register any prospectus unless it is so dated and signed.

Every prospectus must state on the face of it that a copy has been delivered for registration.

If a prospectus is issued without a copy thereof being so delivered, the company, and every person who is knowingly a party to the issue of the prospectus, is liable to a fine not exceeding five pounds for every day from the date of the issue of the prospectus until a copy thereof is so delivered (§ 34).

§ 3.—Statutory Disclosures in Prospectuses.

The history of joint stock enterprise has shown that it provides in the hands of unscrupulous persons a means of exploiting the public. The Companies Acts have accordingly devised from time to time regulations which are designed to afford, so far as is practicable, protection and safeguards for the public interest. One of the methods adopted has been to require that public invitations to subscribe capital to a company must incorporate within themselves a statement of facts relating to the company which are deemed material to its prospects and to the security of the investment which is invited. Section 35 of the Act now provides that—

(1) Every prospectus issued by or on behalf of a company, or by or on behalf of any person who is or has been engaged or interested in the formation of the company, must state the matters specified in Part I of the Fourth Schedule to the Act and set out the reports specified in Part II of that Schedule, and the said Parts I and II have effect subject to the provisions contained in Part III of the said Schedule.

(2) A condition requiring or binding any applicant for shares in or debentures of a company to waive compliance with any requirement of the section, or

purporting to affect him with notice of any contract, document, or matter not specifically referred to in the prospectus, is void.

(3) It is not lawful to issue any form of application for shares in or debentures of a company unless the form is issued with a prospectus which complies with these requirements; but this restriction does not apply if it is shown that the form of application was issued either—

- (a) in connection with a *bond fide* invitation to a person to enter into an underwriting agreement with respect to the shares or debentures; or
- (b) in relation to shares or debentures which were not offered to the public.

Any person who acts in contravention of the provisions of § 35 (3) is liable to a fine not exceeding five hundred pounds.

(4) In the event of non-compliance with or contravention of any of the requirements of the section, a director or other person responsible for the prospectus does not incur any liability by reason of the non-compliance or contravention, if—

- (a) as regards any matter not disclosed, he proves that he was NOT COGNISANT thereof; or
- (b) he proves that the non-compliance or contravention arose from an HONEST MISTAKE OF FACT on his part; or
- (c) the non-compliance or contravention was in respect of matters which in the opinion of the Court dealing with the case were IMMATERIAL or was otherwise such as ought, in the opinion of that Court, having regard to all the circumstances of the case, REASONABLY TO BE EXCUSED.

In the event of failure to include in a prospectus a statement with respect to the matters specified in paragraph 15 of Part I of the Fourth Schedule, no director or other person incurs any liability in respect of the failure unless it is proved that he had knowledge of the matters not disclosed.

(5) The section does not apply to the issue to existing members or debenture holders of a company of a prospectus or form of application relating to shares in or debentures of the company, whether an applicant for shares or debentures will or will not have the right to renounce in favour of other persons, but subject as aforesaid, the section applies to a prospectus or a form of application whether issued on or with reference to the formation of a company or subsequently.

Nothing in the section limits or diminishes any liability which any person may incur under the general law or the Act apart from the section (§ 35).

The following are the provisions contained in the Fourth Schedule above referred to :—

PART I.

MATTERS REQUIRED TO BE STATED IN PROSPECTUS.

1. Except where the prospectus is published as a newspaper advertisement, **THE CONTENTS OF THE MEMORANDUM** with the names, descriptions, and addresses of the signatories, and the number of shares subscribed for by them respectively.

2. The **NUMBER OF FOUNDERS OR MANAGEMENT OR DEFERRED SHARES**, if any, and the nature and extent of the interest of the holders in the property and profits of the company.

3. The number of shares, if any, fixed by the Articles as the **QUALIFICATION OF A DIRECTOR**, and any

provision in the Articles as to the REMUNERATION of the directors.

4. The NAMES, DESCRIPTIONS, AND ADDRESSES OF THE DIRECTORS or proposed directors.

5. Where shares are offered to the public for subscription particulars as to—

(i) The MINIMUM SUBSCRIPTION, *i.e.*, minimum amount which, in the opinion of the directors, must be raised by the issue of those shares in order to provide the sums, or, if any part thereof is to be defrayed in any other manner, the balance of the sums, required to be provided in respect of each of the following matters :—

(a) the PURCHASE PRICE OF ANY PROPERTY purchased or to be purchased which is to be defrayed in whole or in part out of the proceeds of the issue ;

(b) any PRELIMINARY EXPENSES payable by the company, and any COMMISSION so payable to any person in consideration of his agreeing to subscribe for, or of his procuring or agreeing to procure subscriptions for, any shares in the company ;

(c) the REPAYMENT OF ANY MONEYS BORROWED by the company in respect of any of the foregoing matters ;

(d) WORKING CAPITAL ; and

(ii) the amounts to be provided in respect of the matters aforesaid otherwise than out of the proceeds of the issue and the sources out of which those amounts are to be provided.

6. The AMOUNT PAYABLE ON APPLICATION AND ALLOTMENT on each share, and, in the case of a

second or subsequent offer of shares, the amount offered for subscription on each previous allotment made within the two preceding years, the amount actually allotted, and the amount, if any, paid on the shares so allotted.

7. The NUMBER AND AMOUNT OF SHARES AND DEBENTURES which within the two preceding years have been issued, or agreed to be ISSUED, AS FULLY OR PARTLY PAID UP OTHERWISE THAN IN CASH, and in the latter case the extent to which they are so paid up, and in either case the CONSIDERATION for which those shares or debentures have been issued or are proposed or intended to be issued.

8. The NAMES AND ADDRESSES OF THE VENDORS of any property purchased or acquired by the company, or proposed so to be purchased or acquired, which is to be paid for wholly or partly out of the proceeds of the issue offered for subscription by the prospectus, or the purchase or acquisition of which has not been completed at the date of issue of the prospectus, and THE AMOUNT PAYABLE in cash, shares, or debentures, TO THE VENDOR, and where there is more than one separate vendor, or the company is a sub-purchaser, the amount so payable to each vendor.

9. The AMOUNT, IF ANY, PAID OR PAYABLE, AS PURCHASE MONEY in cash, shares, or debentures, for any such property as aforesaid, specifying THE AMOUNT, IF ANY, PAYABLE FOR GOODWILL.

10. The amount, if any, paid within the two preceding years or payable, as COMMISSION (but not including commission to sub-underwriters) FOR SUBSCRIBING OR AGREEING TO SUBSCRIBE, or procuring or agreeing to procure subscriptions, FOR

any SHARES in, or DEBENTURES of, the company, or the rate of any such commission.

11. The amount or estimated amount of PRELIMINARY EXPENSES.

12. THE AMOUNT paid within the two preceding years or intended to be PAID TO ANY PROMOTER, and the consideration for any such payment.

13. The DATES OF AND PARTIES TO EVERY MATERIAL CONTRACT, not being a contract entered into in the ordinary course of the business carried on or intended to be carried on by the company or a contract entered into more than two years before the date of issue of the prospectus, and a reasonable time and place at which any such material contract or a copy thereof may be inspected.

14. The NAMES AND ADDRESSES OF THE AUDITORS, if any, of the company.

15. Full particulars of the nature and extent of THE INTEREST, if any, OF EVERY DIRECTOR IN THE PROMOTION of, or in the property proposed to be acquired by, the company, or, where the interest of such a director consists in being a partner in a firm, the nature and extent of the interest of the firm, with a statement of all sums paid or agreed to be paid to him or to the firm in cash or shares or otherwise by any person either to induce him to become, or to qualify him as, a director, or otherwise for services rendered by him or by the firm in connection with the promotion or formation of the company.

16. If the prospectus invites the public to subscribe for shares in the company and the share capital of the company is divided into different classes of shares, THE RIGHT OF VOTING AT MEETINGS of the company conferred by, and the RIGHTS IN RESPECT

OF CAPITAL AND DIVIDENDS attached to, the several classes of shares respectively.

17. IN THE CASE OF A COMPANY WHICH HAS BEEN CARRYING ON BUSINESS, OR OF A BUSINESS WHICH HAS BEEN CARRIED ON FOR LESS THAN THREE YEARS, THE LENGTH OF TIME DURING WHICH THE BUSINESS of the company or the business to be acquired, as the case may be, **HAS BEEN CARRIED ON.**

PART II.

REPORTS TO BE SET OUT IN PROSPECTUS.

1. A REPORT BY THE AUDITORS of the company with respect to the **PROFITS** of the company in respect of each of the three financial years immediately preceding the issue of the prospectus, and with respect to the **RATES OF THE DIVIDENDS**, if any, paid by the company in respect of each class of shares in the company in respect of each of the said three years, giving particulars of each such class of shares on which such dividends have been paid and particulars of the cases in which no dividends have been paid in respect of any class of shares in respect of any of those years, and, if no accounts have been made up in respect of any part of the period of three years ending on a date three months before the issue of the prospectus, containing a statement of that fact.

2. If the proceeds, or any part of the proceeds, of the issue of the shares or debentures are or is to be applied directly or indirectly in the purchase of any business, A REPORT MADE BY ACCOUNTANTS who shall be named in the prospectus upon the **PROFITS** of the business in respect of each of the three financial years immediately preceding the issue of the prospectus.

PART III.

PROVISIONS APPLYING TO PARTS I AND II OF SCHEDULE.

1. The provisions of this Schedule with respect to the Memorandum and the qualification, remuneration and interest of directors, the names, descriptions, and addresses of directors or proposed directors, and the amount or estimated amount of the preliminary expenses, shall not apply in the case of a prospectus issued more than two years after the date at which the company is entitled to commence business.

2. Every person shall for the purposes of this Schedule be deemed to be a vendor who has entered into any contract, absolute or conditional, for the sale or purchase, or for any option of purchase, of any property to be acquired by the company, in any case where—

- (a) the purchase money is not fully paid at the date of the issue of the prospectus ;
- (b) the purchase money is to be paid or satisfied wholly or in part out of the proceeds of the issue offered for subscription by the prospectus ;
- (c) the contract depends for its validity or fulfilment on the result of that issue.

3. Where any property to be acquired by the company is to be taken on lease, this Schedule shall have effect as if the expression "vendor" included the lessor, and the expression "purchase money" included the consideration for the lease, and the expression "sub-purchaser" included a sub-lessee.

4. For the purposes of paragraph 8 of Part I of this Schedule where the vendors or any of them are a firm, the members of the firm shall not be treated as separate vendors.

5. If in the case of a company which has been carrying on business, or of a business which has been carried on for less than three years, the accounts of the company or business have only been made up in respect of two years or one year, Part II of this Schedule shall have effect as if references to two years or one year, as the case may be, were substituted for reference to three years.

6. The expression "financial year" in Part II of this Schedule means the year in respect of which the accounts of the company or of the business, as the case may be, are made up, and where by reason of any alteration of the date on which the financial year of the company or business terminates the accounts of the company or business have been made up for a period greater or less than a year, that greater or less period shall for the purpose of the said Part of this Schedule be deemed to be a financial year.

Apart from these scheduled disclosures, § 47 of the Act requires that where shares are being issued at a discount, the prospectus relating thereto must contain particulars of the discount allowed on the issue of the shares.

These special statutory provisions demanding that certain matters be specifically stated do not in any way relax the general principle that *any* material statement set out in a prospectus, whether statutorily required or not, must be substantially true.

“ Those who issue a prospectus, holding out to the public the great advantages which will accrue to persons who will take shares in a proposed undertaking, and inviting them to take shares on the faith of the representations therein contained, are bound to state everything with strict and scrupulous accuracy, and not only to abstain from stating as fact that which is not so, but to omit no one fact within their knowledge the existence of which might in any degree affect the nature or extent or quality of the privileges and advantages which the prospectus holds out as inducements to take shares ” (*Kindersley V.C. in New Brunswick & Canada Rail. Co. v. Muggeridge* (1860), 1 Dr. and Sm. 363).

§ 4.—Reports and Documents.

In addition to the reports of auditors and accountants required by Part II of the Fourth Schedule, a prospectus often refers to reports of experts and others. In such a case, if the company will take upon itself to assume the authenticity of the reports, and represent as facts the matters stated in those reports it must take the consequences should they prove false. But if the persons issuing a prospectus merely refer to the report as telling all they know, and propose to send out someone to test it, they will not be treated as guaranteeing its truth (*Re British Burmah Lead Co.* (1887), 56 L.T. 815).

An applicant is entitled to rely on the truth of statements of fact appearing in the prospectus, and is not bound to verify them. When a document, therefore, is referred to in a prospectus, and is offered for inspection, those responsible for the issue of the prospectus are not thereby relieved from responsibility. “ One of the most familiar instances in modern

times is where men issue a prospectus in which they make false statements of the contracts made before the formation of the company, and then say that the contracts themselves may be inspected at the offices of the solicitors. It has always been held that those who accepted those statements as true were not deprived of their remedy merely because they neglected to go and look at the contracts" (*Jessel M.R.*, in *Redgrave v. Hurd* (1881), 20 Ch. D. 1, 14).

And again, Lord Watson said: "It was argued for the company that, inasmuch as the contracts for the purchase of the concession were generally referred to towards the end of the prospectus, the respondent must be held to have notice of their contents. This appears to me to be one of the most audacious pleas that was ever put forward in answer to a charge of fraudulent misrepresentation. When analysed, it means simply that a person who has induced another to act upon a statement made with intent to deceive, must be relieved from the consequences of his deceit if he has given his victim constructive notice of a document, the perusal of which would expose the fraud" (*Aaron's Reefs v. Twiss* (1896), A.C. 273, 287).

§ 5.—Material Contracts.

The mere omission to state material facts does not necessarily amount to misrepresentation unless the effect of the omission is to give a false colour to the prospectus as a whole. It is essential that all material contracts made by the company or by the directors or promoters thereof shall be set out, giving the dates and parties thereto and fixing a reasonable time and place at which the contract or a copy thereof may be inspected.

By material contracts is meant every contract which would be likely to influence the judgment of an intending applicant (*Sullivan v. Metcalf* (1880), 5 C.P.D. 455).

A verbal contract is as material as a contract in writing (*Arkwright v. Newbold* (1881), 17 C.D. 301; *Capel v. Sim's Ships Compositions Co.* (1888), 58 L.T. 807).

The exceptions are contracts in the ordinary course of business and those entered into two years before the date of the issue of the prospectus.

§ 6.—Remedy for Non-disclosure.

A mere failure to make a statutory disclosure where the non-disclosure does not amount to a positive mis-statement does not give the allottee a right to repudiate his shares, or any right of action against the company (*Gover's case* (1875), 1 C.D. 182). The sole remedy is that indirectly conferred by § 35 against directors and others responsible for the issue of the prospectus. To establish a right to compensation the allottee must show—

- (1) That the prospectus omitted to state the date and parties to some contract ;
- (2) That such contract was material ;
- (3) That the omission was knowingly made by the person sued ;
- (4) That the applicant took shares in the company on the faith of such prospectus ;
- (5) That he sustained damage ; and

- (6) That had the omitted particulars appeared, he would not or might not have taken the shares.

A director or other person responsible for the prospectus will not be liable for non-compliance with § 35 if he can prove that so far as non-disclosure of any matter is concerned he was not cognisant of it, or that the non-compliance arose from an honest mistake of fact on his part. The onus of proof is on the director or persons concerned.

A director or other person will not incur liability for non-disclosure of his interest in the promotion of, or sale of property to the company, unless it is proved that he had knowledge of the matters not disclosed (§ 35 (4)).

A company limited by shares or a company limited by guarantee and having a share capital must not previously to the statutory meeting vary the terms of a contract referred to in the prospectus or statement in lieu of prospectus ; except subject to the approval of the statutory meeting. This provision does not apply to a private company (§ 36).

§ 7.—Remedies for Misrepresentation.

Where there is a material misrepresentation, in the prospectus upon which the applicant relied when applying for shares, he may exercise the following remedies:—

- (a) The right to rescind the contract and repudiate the allotment and be placed in the position he was in originally ; this is his only right against the company where the misstatement was innocently made (*Houldsworth v. City of Glasgow Bank* (1880), 5 A.C. 317).

- (b) If it can be shown that the misrepresentation was fraudulent (and it is for the plaintiff to prove fraud where he alleges it), a common law action for damages against the company and the persons responsible for the fraud.
- (c) A statutory claim for compensation which exists, irrespectively of the question of fraud, against those persons (directors and promoters), who were parties to the issue of the prospectus.

In any case the misrepresentation must be one of fact; it must be material, and the applicant must have relied upon it, even if there were also other reasons which induced him to apply for the shares. It may be that even a false statement of opinion will, in some cases, amount to a mis-statement of facts, since "a man's opinion or belief is as much a matter of fact as the state of his digestion" (*Per Bowen, L.J. in Edgington v. Fitzmaurice* (1885), 29 C.D. 483).

(a) **Rescission of the Contract to take Shares.**

In *Lynde v. Anglo-Italian Hemp Spinning Co.* ((1896), 1 Ch. 178), it was decided that in order to make a company liable for misrepresentation inducing a contract to take shares, the statements complained of—

- (1) Must have been made by the directors or general agents of the company, or
- (2) Were made by a special agent within the scope of his authority, or
- (3) Were known to the directors, before the contract of shareholding was complete, or
- (4) Were known to the directors to form the basis on which the contract to take the shares was made.

To entitle an allottee to rescission, the misrepresentation must, as has been seen, be of *fact*, and material, and the applicant must have relied on it. Proof of mere non-disclosure of material facts is not enough to entitle the plaintiff to relief. Thus the failure to disclose the amount of previous allotments (*vide* Fourth Schedule, Part I, § 6) will not of itself be a valid ground for rescission (*South of England Gas Co. (1911)*, 1 Ch. 573). At the same time it is not necessary that some specific allegation of fact should be proved to be in itself false. The true test is whether all the facts as stated taken together present a substantially true picture. If the facts stated give a false impression, the prospectus is none the less false, although it cannot be shown that any specific statement is untrue (*Aaron's Reefs v. Twiss* (1896), A.C. 273, 281; *Oakes v. Turquand* (1867), L.R. 2 H.L. 325).

If the application for rescission is based on the grounds of false statements of fact contained in an expert's report, it must be shown that the directors invited subscriptions on the faith of those statements. Rescission will be refused if the directors clearly stated that they did not vouch for their accuracy.

Non-disclosure of facts is only ground for relief when statements in the prospectus can be shown to be contradictory or inconsistent with facts not disclosed (*Christineville Rubber Estates* (1912), 28 T.L.R. 38); or where the facts disclosed although in themselves individually true are given a false colour by reason of the concealment of other material facts (*Rex v. Kysant* (1931), 47 L.R. 62; *Rex v. Bishirian* (1936), 1 A.E.R. 586). A mere statement of *bonâ fide* OPINION is not enough in itself to entitle the allottee to rescission: but it is otherwise if the opinion is falsely stated and is in itself a material fact (*Edgington v. Fitzmaurice*, *supra*).

Where a prospectus stated that orders had already been received from the House of Commons, and wheels for the trolleys in the House had been ordered and were in use, but the facts were that the caterer to the House used one trolley with those wheels, not ordered by the House, the Court held that the prospectus was fraudulent, and avoided the contract (*Greenwood v. Leather Shod Wheel Co.* (1900), 1 Ch. 421).

The contract to take shares, even though induced by misrepresentation, is valid till rescinded; and an allottee who seeks rescission must take steps to set aside the contract as soon as is reasonably possible after he discovers the misrepresentation. Not only may delay prejudice him in that he remains liable upon the shares until the contract of shareholding is avoided, but unreasonable delay may result in the equitable right of rescission being lost entirely, for equitable remedies must be exercised with expedition. A very short delay may deprive the allottee of his remedy, even if he has no actual proof of misrepresentation, but his attention has been called to the matter in such a manner that his suspicions ought to have been aroused, and he still takes no steps to look into it (*Ashley's Case* (1870), 9 Eq. 269; *Christineville Rubber Estates* (1912), 28 T.L.R. 38).

Where the allottee elects to rescind, a mere notice to the company to this effect is not sufficient; HE MUST TAKE EFFECTIVE STEPS TO SECURE THE RECTIFICATION OF THE REGISTER AND HAVE HIS NAME REMOVED THEREFROM (*First National Reinsurance Co. v. Greenfield* (1921), 37 T.L.R. 235).

The right may also be lost by implied ratification; as by acting on the contract after discovering that he has a right to rescind, by executing a transfer, endeavouring to sell the shares, paying calls, receiving

dividends, or voting at a general meeting (*Hop and Malt Exchange and Warehouse Co., Ex parte Briggs* (1866), 1 Eq. 483).

Moreover, the remedy cannot be asserted where the rights of innocent third parties will be thereby prejudiced. Thus, the winding-up of the company is a bar to rescission, since the rights of creditors have intervened. To be entitled to a rescission in the event of a liquidation, the allottee MUST HAVE COMMENCED PROCEEDINGS BEFORE THE COMMENCEMENT OF THE WINDING-UP (*Oakes v. Turquand* (1867), 2 H.L. 245). But where a person had been induced to take shares by misrepresentation, the mere fact that having commenced proceedings, he afterwards appeared in the character of a shareholder to oppose a petition, did not amount to a waiver of his right to have his name removed from the register (*Tomlin's Case; Re E. Brinsmead & Co.* (1898), 1 Ch. 104).

Upon rescission of the contract to take shares the allottee is entitled to have the amount paid upon the shares returned to him with interest at four per cent. to the time of payment (*Scottish Petroleum Co.* (1883), 23 Ch. D. 413; *Karberg's Case* (1892), 3 Ch. 1).

(b) Damages at Common Law.

Where it can be proved that the misrepresentation upon which the applicant relied was made fraudulently, damages may be sought in a common law action for deceit. Such an action may be instituted against the company itself, but only AFTER the contract of shareholding has been rescinded. The allottee cannot retain the shares and claim damages from the company (*Houldsworth v. City of Glasgow Bank, supra*). It may be observed that upon rescission and the restoration to the quondam shareholder

of any sums paid in respect of the shares together with interest, no further damage for which damages should be awarded will usually have been suffered by him.

As against the persons responsible for the misrepresentation, damages may be claimed in the case of fraud whether or not the contract of shareholding has been rescinded.

In order to succeed in a common law action for fraud, it is for the plaintiff to establish not only that a material mis-statement was made but also that it was made fraudulently, *i.e.*, "knowing it to be false or not believing it to be true or recklessly not caring whether it be true or false" (*Derry v. Peek* (1889), 14 App. Cas. 337).

(c) Compensation under the Act.

The difficulties which arise in asserting a claim for damages founded upon an allegation of fraud were strikingly illustrated in the case of *Derry v. Peek, supra*.

A tramway company obtained powers to run tramcars by steam, but the exercise of those powers was subject to the consent of the Board of Trade. In the belief that this consent would be readily given the directors issued a prospectus which stated without qualification that the company had the right to use steam power. In the event, the Board of Trade refused its consent. In an action brought by a shareholder against the directors who had issued the prospectus, it was held that damages could not be recovered in an action of deceit unless the plaintiff established that the statements complained of had been made fraudulently. Negligence or ignorance gave no cause of action.

This decision was followed by the passing of the Directors Liability Act, 1890, which, in the special case of misrepresentation in a prospectus, created a statutory right to compensation irrespective of fraud. The provisions of that Act are now contained in § 37 of the Act of 1929 and are as follows :—

(1) Where a prospectus invites persons to subscribe for shares in or debentures of a company—

- (a) every person who is a director of the company at the time of the issue of the prospectus ; and
- (b) every person who has authorised himself to be named and is named in the prospectus as a director or as having agreed to become a director either immediately or after an interval of time ; and
- (c) every person being a promoter of the company ; and
- (d) every person who has authorised the issue of the prospectus

is liable to pay COMPENSATION to all persons who subscribe for any shares or debentures on the faith of the prospectus for the loss or damage they may have sustained by reason of any untrue statement therein, or in any report or Memorandum appearing on the face thereof, or by reference incorporated therein or issued therewith, unless it is proved—

- (i) that having consented to become a director of the company he WITHDREW HIS CONSENT BEFORE THE ISSUE OF THE PROSPECTUS, and that it was issued without his authority or consent ; or
- (ii) that THE PROSPECTUS WAS ISSUED WITHOUT HIS KNOWLEDGE or consent, and that ON BECOMING AWARE OF ITS ISSUE he forthwith GAVE REASONABLE PUBLIC NOTICE that it was issued without his knowledge or consent ; or

(iii) that after the issue of the prospectus and before allotment thereunder, he, ON BECOMING AWARE OF ANY UNTRUE STATEMENT therein, WITHDREW HIS CONSENT THERETO, and GAVE REASONABLE PUBLIC NOTICE of the withdrawal, and of the reason therefor ; or

(iv) that —

- (a) As regards every untrue statement not purporting to be made on the authority of an expert, or of a public official document or statement, he had REASONABLE GROUND TO BELIEVE, and did up to the time of the allotment of the shares or debentures, as the case may be, believe, THAT THE STATEMENT WAS TRUE ; and
- (b) as regards every untrue statement purporting to be A STATEMENT BY AN EXPERT or contained in what purports to be A COPY OF OR EXTRACT from a report or valuation of an expert, that it FAIRLY REPRESENTED THE STATEMENT or was a correct and fair copy of or extract from the report or valuation ; and
- (c) as regards every untrue statement purporting to be a STATEMENT MADE BY AN OFFICIAL PERSON or contained in what purports to be a copy of or extract from a public official document, it was a CORRECT AND FAIR REPRESENTATION OF THE STATEMENT or copy of or extract from the document.

A person is liable, however, to pay compensation as aforesaid if it is proved that he had NO REASONABLE GROUND TO BELIEVE that the person making any such statement, report, or valuation as is mentioned in paragraph (iv) (b) above was competent to make it.

(2) Where the prospectus contains the name of a person as a director of the company, or as having agreed to become a director thereof, and he has not consented to become a director, or has withdrawn his consent before the issue of the prospectus, and has not authorised or consented to the issue thereof, the directors of the company, except any without whose knowledge or consent the prospectus was issued, and any other person who authorised the issue thereof, are liable to indemnify the person named as aforesaid against all damages, costs, and expenses to which he may be made liable by reason of his name having been inserted in the prospectus, or in defending himself against any action or legal proceedings brought against him in respect thereof.

(3) Every person who by reason of his being a director, or named as a director or as having agreed to become a director, or of his having authorised the issue of the prospectus, becomes liable to make any payment under this section may recover contribution, as in cases of contract, from any other person who, if sued separately, would have been liable to make the same payment, unless the person who has become so liable was, and that other person was not, guilty of fraudulent misrepresentation.

(4) For these purposes the expression "promoter" means a promoter who was a party to the preparation of the prospectus, or of the portion thereof containing the untrue statement, but does not include any person by reason of his acting in a professional capacity for persons engaged in procuring the formation of the company; and the expression "expert" includes engineer, valuer, accountant, and any other person whose profession gives authority to a statement made by him.

The following points should be particularly noticed in relation to the statutory remedy provided by this section :—

- (a) In asserting a claim, it is not necessary to prove fraud. It is sufficient for the claimant to show (i) that a material mis-statement was made, (ii) that he was deceived by it, and (iii) that he suffered loss or damage in consequence.
- (b) When such facts are established, the claimant is *prima facie* entitled to compensation. The parties sued can then escape liability only by setting up one or other of the narrow technical defences created by the section.
- (c) The remedy is available as against all persons who are parties to or who authorised the prospectus.
- (d) Compensation may be claimed notwithstanding that the contract of shareholding has not been rescinded, and even though a winding-up has commenced.

The defence created by § 37 (1) (iv) is not available to a director who has relied upon statements made by an expert who is also the vendor to the company (*Adams v. Thrift* (1915), 2 Ch. 21.).

Mere non-disclosure of facts is not sufficient to support an action for compensation or damages, unless the non-disclosure is such as to make the statement in the prospectus false (*Aaron's Reefs v. Twiss* (1896), A. C. 273, 287).

The Limitation Act, 1623, applies to such proceedings against directors so that action must be taken within six years from the date of allotment (*Thomson*

v. *Lord Clanmorris* (1900), 1 Ch. 718), save where there has been concealed fraud (*Gibbs v. Guild* (1882), 9 Q.B.D. 59), or where at that date the allottee is under some disability.

The right to rescind a contract of shareholding upon the ground of material misrepresentation in a prospectus exists only in an original allottee of shares and is not available to subsequent holders. Persons other than the original allottee cannot claim to have been induced to enter into the contract of shareholding by mis-statements made by the company TO THEM.

So also the statutory remedy exercisable against the persons responsible for the issue of a prospectus, can be asserted solely by persons who have taken shares FROM the company upon the faith of statements in the prospectus.

Thus in *Collins v. Associated Greyhound Racecourses* (1930), 1 Ch. 1, a person in whose favour an allottee renounced his holding was held to have no remedy even though the original allottee had acted as a nominee for the claimant. As between him and the company he could not say that he had taken the shares on the faith of statements held out to him.

The position is different where the action is founded on fraud. In such case, any person who is deceived and who suffers damage is entitled to sue if he can show that it was intended that he should act on the mis-statements whether they were made directly to him or not. In *Andrews v. Mockford* ((1896), 1 Q.B. 372), where it was shown that a false prospectus was PERSISTENTLY CIRCULATED WITH A VIEW TO INDUCING PURCHASES IN THE MARKET ; it was held that in such a case any person having taken shares on the strength of the prospectus was entitled to claim damages for

fraud, whether he originally subscribed for those shares or bought them in the open market.

The measure of damages is the difference between the value of shares in a company having the advantage stated in the prospectus, and the value of shares in a company without these advantages; the difference being ascertained as on the day after allotment (*McConnell v. Wright* (1903), 1 Ch. 546).

A promoter or director who has paid damages as a result of proceedings under § 37 of the Act is entitled to contribution from any co-director or co-promoter who would have himself been liable in damages; and the right is not lost by reason of the death of such co-director or co-promoter, an action being maintainable against the latter's estate, since by § 37 (3) the right to contribution arises as in cases of contract between the parties (*Shepherd v. Bray* (1906), 2 Ch. 235).

This position has ceased to be peculiar to the form of action governed by § 37. It is now the general rule of law that, subject to certain qualifications, personal rights of action survive the death of either party (Law Reform (Miscellaneous Provisions) Act, 1934). Moreover, the right as between persons jointly liable for a civil wrong to seek contribution from each other has been made generally applicable (Law Reform (Married Women and Tortfeasors) Act, 1935).

§ 8.—Offers for Sale.

Reference to § 35 (1) of the Act will show that the requirements as to disclosure defined by the Fourth Schedule are made applicable by that section only to a "prospectus issued by or on behalf of a company

or by, or on behalf of any person who is or has been engaged in the formation of the company." So far as § 35 provides, there is no legal duty to disclose specific matters, or, indeed, anything at all, where the prospectus is not issued by or on behalf of the company or by some person concerned in its formation. By the simple expedient of allotting the whole of an issue to a financial house and then extending an invitation FROM THAT ALLOTTEE to the public, the prospectus which results is free from the operation of § 35, and it appears to escape entirely the obligation to make such disclosures as the law deems it expedient to make in any public invitation to take up shares in a company. In order to meet the device of introducing an issuing house between the company and the public, the Act extends the application of § 35 by the provisions of § 38. This section enacts that where a company allots or agrees to allot any shares in or debentures of the company with a view to all or any of those shares or debentures being offered for sale to the public, any document by which the offer for sale to the public is made is for all purposes deemed to be a prospectus issued by the company, and all enactments and rules of law as to the contents of prospectuses and to liability in respect of statements in and omissions from prospectuses, or otherwise relating to prospectuses, apply and have effect accordingly, as if the shares or debentures had been offered to the public for subscription and as if persons accepting the offer in respect of any shares or debentures were subscribers for those shares or debentures, but without prejudice to the liability, if any, of the persons by whom the offer is made, in respect of mis-statements contained in the document or otherwise in respect thereof.

For the purposes of the Act, it is, unless the contrary is proved, evidence that an allotment of, or an agreement to allot, shares or debentures was made with a view to the shares or debentures being offered for sale to the public, if it is shown—

- (a) that an offer of the shares or debentures or of any of them for sale to the public was made within six months after the allotment or agreement to allot ; or
- (b) that at the date when the offer was made the whole consideration to be received by the company in respect of the shares or debentures had not been so received.

Section 34 of the Act (dealing with the dating and registration of a prospectus; see § 2 of this Chapter), has effect as though the persons making the offer were persons named in a prospectus as directors of a company, and § 35, which deals with the particulars to be given, has effect as if it required a prospectus to state in addition to the matters required by that section to be stated in a prospectus—

- (a) the net amount of the consideration received or to be received by the company in respect of the shares or debentures to which the offer relates ; and
- (b) the place and time at which the contract under which the said shares or debentures have been or are to be allotted may be inspected.

Where a person making such an offer is a company or a firm, it is sufficient if the document containing the offer is signed on behalf of the company or firm by two directors of the company or not less than half of the partners, as the case may be, and any such director or partner may sign by his agent authorised in writing (§ 38 (4)).

Legitimate offers for sale of shares by persons who had originally acquired them in the ordinary way, and not, as in the case of financial houses, for the specific purpose of being offered to the public are not affected by the provisions of § 38.

§ 9.—Prospectuses of Foreign Companies.

Persons acting on behalf of foreign companies who issue or circulate prospectuses in this country are subject to provisions similar to those applicable upon the issue of a prospectus by or on behalf of a company registered under the Act. The requirements are dealt with under Part XII of the Act, in §§ 354 and 355 as follows :—

354.—(1) It shall not be lawful for any person—

- (a) To issue or circulate or distribute in Great Britain any prospectus offering for subscription shares in or debentures of a company incorporated or to be incorporated outside Great Britain whether the company has or has not established or when formed will or will not establish, a place of business in Great Britain unless—
 - (i) before the issue or circulation or distribution of the prospectus in Great Britain a copy thereof, certified by the chairman and two other directors of the company as having been approved by resolution of the managing body has been delivered for registration to the registrar of companies,
 - (ii) the prospectus states on the face of it that the copy has been so delivered,
 - (iii) the prospectus is dated,
 - (iv) the prospectus otherwise complies with this Part of this Act,
- (b) to issue to any person in Great Britain a form of application for shares in or debentures of such a company or intended company as aforesaid unless the form is issued with a prospectus which complies with this Part of this Act

Provided that this provision shall not apply if it is shown that the form of application was issued in connection with a *bona fide* invitation to a person to enter into an underwriting agreement with respect to the shares or debentures

(2) This section shall not apply to the issue to existing members or debenture holders of a company of a prospectus or form of application relating to shares in or debentures of the company, whether an applicant for shares or debentures will or will not have the right to renounce in favour of other persons but, subject as aforesaid, this section shall apply to a prospectus or form of application whether issued on or with reference to the formation of a company or subsequently

(3) Where any document by which any shares in or debentures of a company incorporated outside Great Britain are offered for sale to the public

would, if the company concerned had been a company within the meaning of this Act, have been deemed by virtue of section thirty-eight of this Act, to be a prospectus issued by the company, that document shall be deemed to be, for the purposes of this section, a prospectus issued by the company.

(4) An offer of shares or debentures for subscription or sale to any person whose ordinary business or part of whose ordinary business it is to buy or sell shares or debentures, whether as principal or agent, shall not be deemed an offer to the public for the purposes of this section.

(5) Section thirty-seven of this Act shall extend to every prospectus to which this section applies

(6) Any person who is knowingly responsible for the issue, circulation or distribution of any prospectus or for the issue of a form of application for shares or debentures in contravention of the provisions of this section shall be liable to a fine not exceeding five hundred pounds.

(7) In this and the next following section the expressions "prospectus," "shares," and "debentures" have the same meanings as when used in relation to a company incorporated under this Act.

355. (1) In order to comply with this Part of this Act a prospectus in addition to complying with the provisions of sub-paragraphs (ii) and (iii) of paragraph (a) of subsection (1) of the last foregoing section must—

(a) contain particulars with respect to the following matters—

(i) the objects of the company ;

(ii) the instrument constituting or defining the constitution of the company ;

(iii) the enactments, or provisions having the force of an enactment, by or under which the incorporation of the company was effected ;

(iv) an address in Great Britain where the said instrument, enactments or provisions, or copies thereof, and if the same are in a foreign language a translation thereof certified in the prescribed manner, can be inspected ;

(v) the date on which and the country in which the company was incorporated ;

(vi) whether the company has established a place of business in Great Britain, and, if so, the address of its principal office in Great Britain :

Provided that the provisions of sub-paragraphs (i), (ii), (iii) and (iv) of this paragraph shall not apply in the case of a prospectus issued more than two years after the date at which the company is entitled to commence business

(b) subject to the provisions of this section, state the matters specified in Part I of the Fourth Schedule to this Act (other than those specified in paragraph 1 of the said Part I) and set out the reports specified in Part II of that Schedule subject always to the provisions contained in Part III of the said Schedule :

Provided that—

(i) where any prospectus is published as a newspaper advertisement, it shall be a sufficient compliance with the requirement that the prospectus must specify the objects of the company if the advertisement specifies the primary object with which the company was formed ; and

(ii) in paragraph 3 of Part I of the said Fourth Schedule a reference to the constitution of the company shall be substituted for the reference to the articles ; and

(iii) paragraph I of Part III of that Schedule shall have effect as if the reference to the memorandum were omitted therefrom.

(2) Any condition requiring or binding any applicant for shares or debentures to waive compliance with any requirement of this section or purporting to affect him with notice of any contract, document, or matter not specifically referred to in the prospectus, shall be void

(3) In the event of non-compliance with or contravention of any of the requirements of this section, a director or other person responsible for the prospectus shall not incur any liability by reason of the non-compliance or contravention, if—

- (a) as regards any matter not disclosed, he proves that he was not cognisant thereof; or
- (b) he proves that the non-compliance or contravention arose from an honest mistake of fact on his part; or
- (c) the non-compliance or contravention was in respect of matters which, in the opinion of the court dealing with the case, were immaterial or were otherwise such as ought in the opinion of that court, having regard to all the circumstances of the case, reasonably to be excused

Provided that, in the event of failure to include in a prospectus a statement with respect to the matters contained in paragraph 15 of Part I of the Fourth Schedule to this Act, no director or other person shall incur any liability in respect of the failure unless it be proved that he had knowledge of the matters not disclosed

(4) Nothing in this section shall limit or diminish any liability which any person may incur under the general law or this Act, apart from this

§ 10.—Share Hawking.

The activities of persons making offers of shares (generally of a highly speculative character, and frequently worthless) either broadcast by letter or by personal "hawking" from house to house, made it necessary for the Act to contain provisions (in § 356 designed to stop such practices. These provisions are in addition to the cognate §§ 354 and 355 (*supra*).

It is not lawful for any person to go from house to house offering shares for subscription or purchase to the public or any member of the public. The expression "house" does not include an office used for business purposes (§ 356 (1)).

It is not lawful to make an offer in writing to any member of the public (not being a person whose ordinary business or part of whose ordinary business it is to buy or sell shares, whether as principal or agent), of any shares for purchase, unless the offer is accompanied by a statement in writing (which must be signed

by the person making the offer and dated) containing the particulars and otherwise complying with the requirements stated below, or, in the case of shares in a company incorporated outside Great Britain, either by such a statement as aforesaid, or by such a prospectus as complies with this Part of the Act. These provisions do not apply however—

- (a) where the shares to which the offer relates are shares which are quoted on, or in respect of which permission to deal has been granted by any recognised stock exchange in Great Britain and the offer so states and specifies the stock exchange ; or
- (b) where the shares to which the offer relates are shares which a company has allotted or agreed to allot with a view to their being offered for sale to the public ; or
- (c) where the offer was made only to persons with whom the person making the offer has been in the habit of doing regular business in the purchase or sale of shares (§ 356 (2)).

The written statement must not contain any matter other than the prescribed particulars, and must not be in characters less large or less legible than any characters used in the offer or in any document sent therewith (§ 356 (3)).

The statement must contain particulars with respect to the following matters :—

- (a) whether the person making the offer is acting as principal or agent, and if as agent the name of his principal and an address in Great Britain where the principal can be served with process ;

- (b) the date on which and the country in which the company was incorporated and the address of its registered or principal office in Great Britain ;
- (c) the authorised share capital of the company and the amount thereof which has been issued, the classes into which it is divided and the rights of each class of shareholders in respect of capital, dividends and voting ;
- (d) the dividends, if any, paid by the company on each class of shares during each of the three financial years immediately preceding the offer, and if no dividend has been paid in respect of shares of any particular class during any of those years, a statement to that effect ;
- (e) the total amount of any debentures issued by the company and outstanding at the date of the statement, together with the rate of interest payable thereon ;
- (f) the names and addresses of the directors of the company ;
- (g) whether or not the shares offered are fully paid up, and, if not, to what extent they are paid up ;
- (h) whether or not the shares are quoted on, or permission to deal therein has been granted by any recognised stock exchange in Great Britain or elsewhere, and, if so, which, and, if not, a statement that they are not so quoted or that no such permission has been granted.
- (i) where the offer relates to units, particulars of the name and addresses of the persons in

whom the shares represented by the units are vested, the date of and the parties to any document defining the terms on which those shares are held, and an address in Great Britain where that document or a copy thereof can be inspected.

The expression "company" here means the company by which the shares to which the statement relates were or are to be issued (§ 356 (4)).

If any person acts, or incites, causes or procures any person to act, in contravention of the section, he is liable to imprisonment for a term not exceeding six months or to a fine not exceeding two hundred pounds, or to both such imprisonment and fine, and in the case of a second or subsequent offence to imprisonment for a term not exceeding twelve months or to a fine not exceeding five hundred pounds, or to both such imprisonment and fine (§ 356 (5)).

Where a person convicted of an offence is a company (whether a company within the meaning of the Act or not), every director and every officer concerned in the management of the company is guilty of the like offence unless he proves that the act constituting the offence took place without his knowledge or consent (§ 356 (6)).

Unless the context otherwise requires, the expression "shares" means the shares of a company, whether a company within the meaning of the Act or not, and includes debentures and units, and the expression "unit" means any right or interest (by whatever name called) in a share, and a person will not in relation to a company be regarded as not being a member of the public by reason only that he is a holder of shares in the company or a purchaser of goods from the company (§ 356 (7)).

Where any person is convicted in England of having made an offer in contravention of the provisions of this section, the Court before which he is convicted may order that any contract made as a result of the offer shall be void, and, where it makes any such order, may give such consequential directions as it thinks proper for the repayment of any money or the retransfer of any shares.

Where the Court makes such an order (whether with or without consequential directions) an appeal against the order and the consequential directions, if any, lies to the High Court (§ 356 (8)).

SYNOPSIS OF CHAPTER VI.

**APPLICATION AND ALLOTMENT AND
THE COMMENCEMENT OF BUSINESS**

§ 1 —APPLICATION FOR SHARES

2 —ALLOTMENT OF SHARES

3 —RESTRICTIONS ON ALLOTMENT

4.—STATEMENT IN LIEU OF PROSPECTUS.

5 IRREGULAR ALLOTMENTS

6 — RETURN OF ALLOTMENTS

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CHAPTER VI.

APPLICATION AND ALLOTMENT AND
THE COMMENCEMENT OF BUSINESS.

§ 1.—Application for Shares.

Application for shares is normally made on definite terms laid down by the company, and in the case of a public issue the terms upon which shares are to be applied for will be set out on the prospectus.

The application form, which generally accompanies the prospectus, should be so worded as to show clearly the terms upon which shares are applied for; and it is usual so to word the form as to make the application subject to the terms of the prospectus and of the Memorandum and Articles of the company. It is not now lawful to issue any form of application in respect of shares or debentures unless accompanied by a prospectus, except where the form was issued in connection with a *bonâ fide* invitation to a person to enter into an underwriting agreement with respect to such shares or debentures, or in relation to an issue not made to the public. The penalty for contravention of this provision is a fine not exceeding £500 (§ 35 (3)).

An application should authorise the allotment of a number of shares less than those applied for, since otherwise such an allotment is bad (*Ex parte Roberts*, (1852), 1 Drew, 204). An allotment must not depart from the terms of the application (*Barrett's*

Case (1865), 3 De G. J. & S. 30 ; *Jackson v. Turquand* (1869), 4 H.L. 305), for the acceptance of an offer must be unqualified if a contract is to be thereby created.

The application need not be in writing, and can be withdrawn at any time before acceptance by allotment. The revocation may be communicated to the secretary of the company or even to a clerk in his office if the secretary be absent (*Truman's Case* (1894), 3 Ch. 272 ; *Crawley's Case* (1869), 4 Ch. 322). Where the revocation is sent by post actual delivery to the company is necessary to render it effectual (*Henthorn v. Fraser* (1892), 2 Ch. 27).

The application may be made by an agent (*Fraser's Case* (1871), 24 L.T. 746) ; but he should apply in the name of his principal, otherwise if the shares are allotted to himself he will be personally liable. If he applies *as agent* but without authority, he will not become a member himself, nor can his purported principal become the holder of the shares allotted unless he chooses to ratify the application. If there is no ratification, the professed agent will be liable for breach of warranty of authority to the extent of the loss sustained by the company, which may be the whole nominal value of the shares (*Ex parte Panmure* (1883), 24 Ch. D. 367 ; *Coventry's Case* (1891), 1 Ch. 202).

An application may be conditional, and where there is a condition precedent, an allotment which disregards the condition will be void (*Rogers' Case* (1868), 3 Ch. App. 633). In that case the application was made on condition that the applicant was appointed to a post in the company ; he was not appointed, and the Court held that the allotment was void. But if

the condition can be separated from the application so as to form only a collateral or subsequent condition the applicant is bound by the allotment, and his only remedy is to take steps to enforce the condition (*Elkington's Case* (1867), 2 Ch. App. 511).

§ 2.—Allotment of Shares.

The allotment of shares being the acceptance of the offer to take them, completes the contract between the allottee and the company. The fact of allotment must be communicated, but the communication need not be in any particular form unless the Articles of the company provide otherwise (*Levita's Case* (1870), 5 Ch. App. 489). It must be given to the applicant or to his agent duly authorised to receive it, an agent applying for shares having no implied authority to receive notice of allotment (*Robinson's Case* (1869), 4 Ch. App. 322).

In the ordinary course, the post is the channel of communication between the applicant and the company, and where this is so an allotment is complete as soon as the letter of allotment is posted, and this even though it is never received (*Household Fire Insurance Co. v. Grant* (1879), 4 Ex. D. 216), or, presumably, where it is delayed in the post (*Dunlop v. Higgins* (1848), 1 H.L. 381). But the allotment is not complete until the letter actually reaches the Post Office; delivery to a town postman in the street not being sufficient (*London & Northern Bank* (1900), 1 Ch. 220). The allotment must be made within a reasonable time after the date of application; if there is undue delay, the allottee is entitled to repudiate the contract (*Ramsgate Hotel Co. v. Montefiore* (1866), 1 Ex. 109).

The issue of bonus shares as a gift is illegal (*Eddystone Marine Insurance Co.* (1893), 3 Ch. 9). A company can, of course, issue bonus shares to its members out of capitalised profits, for that is not a gift. Shares may be issued at a premium of any amount, the premium being the excess amount receivable from the allottee over the nominal value of the shares. Such premium does not form part of the capital (*Hilder v. Dexter* (1902), App. Cas. 474); but is nevertheless capital money (*Shorto v. Colwill* (1909), 101 L.T. 598).

If the value of the shares amounts to £5 or more, the letter of allotment requires a 6d. impressed stamp, and if under £5 a 1d. impressed stamp (Finance Act, 1899, § 9); the penalty for failure to stamp it being £20 (Stamp Act, 1891, § 29).

An unstamped allotment, however, is sufficient acceptance to make a binding contract to take shares (*Whitley Partners* (1886), 42 L.T. 11).

§ 3.—Restrictions on Allotment.

There are no restrictions upon the right of a private company to allot shares, and it may accordingly proceed to allotment immediately after it has been incorporated.

In the case of a public company, however, the policy of the law to protect the interests of the public manifests itself in restrictive provisions regulating the allotment of shares by the company. Section 39 of the Act provides that where any share capital of a company is first offered to the public for subscription, no allotment shall be made, unless the amount stated in the prospectus as the minimum subscription (*see infra*) has been subscribed and the sum payable on application for the amount so stated, has been paid to AND RECEIVED BY the company.

For this purpose a sum is deemed to have been paid to and received by the company if a cheque for that sum has been received in good faith by the company and the directors of the company have no reason for suspecting that the cheque will not be paid.

The minimum subscription must be reckoned exclusively of any amount payable otherwise than in cash.

The amount payable on application on each share must not be less than five per cent. of the nominal amount of the share.

If these conditions have not been complied with on the expiration of forty days after the first issue of the prospectus, all money received from applicants for shares must be forthwith repaid to them without interest, and, if any such money is not so repaid within forty-eight days after the issue of the prospectus, the directors of the company are jointly and severally liable to repay that money, with interest at the rate of five per centum per annum from the expiration of the forty-eighth day. A director is not liable, however, if he proves that the default in the repayment of the money was not due to any misconduct or negligence on his part.

Any condition requiring or binding any applicant for shares to waive compliance with any of the requirements of § 39 is void.

It should be noticed that while the totality of these provisions does not apply to any allotment subsequent to the first allotment of shares offered to the public for subscription, the requirement that the amount payable on application must be not less than 5 per cent. of the nominal value of the shares applies to ALL allotments of shares so offered to the public.

The object of the minimum subscription is to ensure that the company shall commence business with a sufficiency of capital for its reasonable requirements. Under paragraph 5 of Part I of the Fourth Schedule, the MINIMUM SUBSCRIPTION is the amount which, in the opinion of the directors, must be raised in order to provide the sums, or if any part thereof is to be defrayed in any other manner, the balance of the sums required to be provided in respect of each of the following matters :—

- (a) the purchase price of any property purchased or to be purchased which is to be defrayed in whole or in part out of the proceeds of the issue ;
- (b) any preliminary expenses payable by the company, and any commission so payable to any person in consideration of his agreeing to subscribe for, or of his procuring or agreeing to procure subscriptions for any shares in the company ;
- (c) the repayment of any moneys borrowed by the company in respect of any of the foregoing matters ;
- (d) working capital.

It should be noted that the minimum subscription appears only in the prospectus, and not in the Articles.

In view of the provision for the repayment of all application moneys if the minimum subscription is not reached within forty days of the issue of a prospectus, the application money should be kept intact until the minimum subscription is obtained.

In the case of companies (other than private companies), which do not issue an invitation to the public, or which have issued a prospectus but have not proceeded to allot any shares or debentures so offered

to the public, no allotment can be made, unless at least three days before the first allotment of shares or debentures the company concerned has delivered to the registrar a statement in lieu of prospectus (*see* § 4 *below*). Upon any contravention, the company and every director cognisant thereof is liable to a fine not exceeding £100 (§ 40).

§ 4.—Statement in Lieu of Prospectus.

Where no prospectus has been issued by a public company, the information demanded by the Fourth Schedule to the Act has not been disclosed to the public. It is accordingly provided that as a necessary alternative, there be delivered to the registrar for registration a statement in lieu of prospectus in the form prescribed by the Fifth Schedules where the company seeks to allot any of its shares or debentures (§ 40), or to commence business (§ 94, *see* § 9, *infra*). It may be said that the disclosures required by the Fifth Schedule correspond substantially to the matters which must be revealed in a prospectus, but a statement in lieu of prospectus, need not set out:—

- (1) The contents of the Memorandum ;
- (2) Particulars of founders' or deferred shares ;
- (3) The qualification and remuneration of directors ;
- (4) A minimum subscription ;

It must, however, show *inter alia*,

- (1) The nominal capital and the shares into which it is divided ;
- (2) The voting rights of different classes of shares.

The following is the form prescribed in the Fifth Schedule to the Act for the statement in lieu of prospectus :—

FIFTH SCHEDULE

THE COMPANIES ACT 1929

STATEMENT IN LIEU OF PROSPECTUS

delivered for registration by

(Insert the name of the Company)

Pursuant to section 40 of the Companies Act, 1929

delivered for registration by

The nominal share capital of the £
Company

Divided into

Shares of £

each.

'

'

"

"

"

"

Amount (if any) of above capital
which consists of redeemable pre-
ference shares

Shares of £

each

The date on or before which these
shares are or are liable to be
redeemed

Names, descriptions and addresses
of directors or proposed directors

If the share capital of the company
is divided into different classes of
shares the right of voting at
meetings of the company conferred
by and the rights in respect of
capital and dividends attached to
the several classes of shares re-
spectively

Number and amount of shares and debentures agreed to be issued as fully or partly paid up otherwise than in cash	1	shares of £	fully
	2	paid	
	3	shares upon which £	
	4	per share credited as paid	
The consideration for the intended issue of these shares and deben- tures	5	debenture	£
	6	Consideration	

Names and addresses of vendors
of property purchased or acquired
or proposed to be purchased or
acquired by the company

Amount (in cash shares or deben-
tures) payable to each separate
vendor

Amount (if any) paid or payable (in cash or shares or debentures) for any such property, specifying amount (if any) paid or payable for goodwill.	Total purchase price £ Cash £ Shares £ Debentures .. £ Goodwill .. £
Amount (if any) paid or payable as commission for subscribing or agreeing to subscribe or procuring or agreeing to procure subscriptions for any shares or debentures in the company, or	Amount paid. .. payable.
Rate of the commission	Rate per cent.
The number of shares (if any) which persons have agreed for a consideration to subscribe absolutely.	
Estimated amount of preliminary expenses	£
Amount paid or intended to be paid to any promoter. Consideration for the payment.	Name of promoter. Amount £ Consideration :—
Dates of, and parties to, every material contract (other than contracts entered into in the ordinary course of the business intended to be carried on by the company or entered into more than two years before the delivery of this statement).	
Time and place at which the contracts or copies thereof may be inspected.	
Names and addresses of the auditors of the company (if any).	
Full particulars of the nature and extent of the interest of every director in the promotion of or in the property proposed to be acquired by the company, or, where the interest of such a director consists in being a partner in a firm, the nature and extent of the interest of the firm, with a statement of all sums paid or agreed to be paid to him or to the firm in cash or shares, or otherwise, by any person either to induce him to become, or to qualify him as, a director, or otherwise for services rendered by him or by the firm in connection with the promotion or formation of the company.	

If it is proposed to acquire any business, the amount, as certified by the persons by whom the accounts of the business have been audited, of the net profits of the business in respect of each of the three financial years immediately preceding the date of this statement provided that in the case of a business which has been carried on for less than three years and the accounts of which have only been made up in respect of two years or one year the above requirement shall have effect as if reference to two years or one year as the case may be were substituted for references to three years, and in any such case the statement shall say how long the business to be acquired has been carried on

(Signatures of the persons above-named as
directors or proposed directors, or of
their agents authorised in writing)

Date

NOTE.—In this Schedule the expression "vendor" includes a vendor as defined in Part III of the Fourth Schedule to this Act and the expression "financial year" has the meaning assigned to it in that Part of the said Schedule.

Where a statement in lieu of prospectus containing material misrepresentations is filed with the registrar, an allottee who was induced to apply for shares upon the faith of the particulars filed, may be entitled to seek rescission of the contract of shareholding. Where, however, the allottee has not inspected the statement in lieu, he cannot claim to have been misled by the false representations and will therefore have no remedy (*Blair Open Hearth Furnace Co. (1914)*, 1 Ch. 390). Moreover, an allotment of shares is not necessarily void if there are material misstatements or omission in the statement in lieu of prospectus (*ibid.*). The right to compensation conferred by § 37 where a PROSPECTUS contains material misrepresentations is not available to an allottee,

who relies upon a false representation in a statement in lieu of prospectus ; but the common law right to sue in deceit will be appropriate where the untrue statement is filed with knowledge of its falsity.

Under § 362 of the Act, any person who, in a statement in lieu of prospectus, wilfully makes a statement false in some material particular, knowing it to be false, is made criminally liable and punishable by fine or imprisonment, or both.

§ 5.—Irregular Allotments.

An allotment made by a company to an applicant in contravention of the provisions of §§ 39 and 40 (*supra*) is voidable at the instance of the applicant within one month after the holding of the statutory meeting of the company and not later, or in any case where the company is not required to hold a statutory meeting, or where the allotment is made after the holding of the statutory meeting within one month after the date of the allotment, and not later, and is so voidable notwithstanding that the company is in course of being wound up.

If any director of a company knowingly contravenes or permits or authorises the contravention of any of the provisions of §§ 39 and 40 with respect to allotment, he is liable to compensate the company and the allottee respectively for any loss, damages, or costs which the company or the allottee may have sustained or incurred thereby ; but proceedings to recover any such loss, damages, or costs cannot be commenced after the expiration of two years from the date of the allotment (§ 41).

If, after ascertainment of the irregularity, the allottee acquiesces in it in any way, he will be

debarred from exercising the remedy given under this section (*Finance and Issue, Ltd., v. Canadian Produce Co.* (1905), 1 Ch. 37); but if notice is given within a month after the statutory meeting that it is intended to avoid allotment, the actual proceedings may be taken after that period has expired (*National Motor Mail Coach Co.* (1908), 2 Ch. 228).

Where an allotment has been made contrary to the provisions of § 40, and the shares have been transferred to another person before the statement in lieu of prospectus is filed, but the transfer is presented for registration after such statement has been filed, the transferee is estopped from setting up the irregularity if he has accepted the share certificate, attended a meeting of shareholders, or accepted a bonus declared by the company (*In re Burton & Son* (1927), 2 Ch. 132).

§ 6.—Return of Allotments.

Within one month of any allotment, a return has to be made to the registrar stating the number and nominal amount of the shares allotted, the names, addresses and descriptions of the allottees, and the amount (if any) paid or due and payable on each share. In the case of shares allotted as fully or partly paid up otherwise than in cash, the company must also deliver to the Registrar a contract in writing constituting the title of the allottee to the allotment, together with any contract of sale, or for services or other consideration in respect of which that allotment was made, such contracts being duly stamped, and a return stating the number and nominal amount of shares so allotted, the extent to which they are to be treated as paid up, and the consideration for which they have been allotted.

Where such a contract is not reduced to writing, the company must within one month after the allotment deliver to the registrar of companies for registration the prescribed particulars of the contract stamped with the same stamp duty as would have been payable if the contract had been reduced to writing, and those particulars are deemed to be an instrument within the meaning of the Stamp Act, 1891, and the registrar may, as a condition of filing the particulars, require that the duty payable thereon be adjudicated under § 12 of that Act.

If default is made in complying with the above provisions, every director, manager, secretary, or other officer of the company, who is knowingly a party to the default, is liable to a fine not exceeding £50 for every day during which the default continues. In the case of default in delivering to the registrar of companies within one month after the allotment any of the above documents, the company, or any person liable for the default, may apply to the Court for relief, and the Court, if satisfied that the omission to deliver the document was accidental or due to inadvertence, or that it is just and equitable to grant relief, may make an order extending the time for the delivery of the document for such period as the Court may think proper (§ 42).

If it is desired to issue shares in satisfaction of a debt, without filing a contract, it is safest to issue shares subject to calls, and then set off the cross-claims of the company and the allottee, any circumstances creating a set-off being a sufficient cash consideration (*Spargo's Case* (1873), 8 Ch. App. 407).

If, however, shares are issued as fully paid in consideration of the release of a debt due, this is not

a cash payment and the necessary contracts must be filed (*Johannesburg Hotel Co.* (1891), 1 Ch. 119, 129).

If a vendor nominates other persons to receive part of the share consideration due to him, there must either be filed a supplementary contract showing the title of such nominees to allotment, or a nomination by the vendor in their favour, stamped in the same way as a letter of renunciation, i.e., 6d. if the total amount of the shares is £5 or upwards, and 1d. where the total amount is less than £5.

A contract to allot to a vendor any proportion of future issued capital is only good on the terms that the vendor pays in full for any shares so allotted (*Hong Kong and China Gas Co. v. Glen* (1914), 1 Ch. 527).

A contract to allot shares to the promoters in respect of services which have enhanced the value of the property is part of the purchase price, but it is doubtful if a contract of this nature would be good if the property was not enhanced by the services. An agreement for future services would not constitute good consideration for shares (*Pellatt's case* (1867), 2 Ch. 527), but if the company agrees to pay a sum at once in cash in respect of future services, that sum can be set off in paying up shares (*Gardner v. Iredale* (1912), 1 Ch. 700).

§ 7.—Payment of Commission.

In order to prevent the failure of an issue, it is usual to have at least the "minimum subscription" underwritten; that is to say, an agreement is entered into before the shares are offered to the public, that in the event of the public not taking up the whole of them, or the number specified in the agreement,

the underwriter will, for an agreed commission, take an allotment of such part of the shares as the public has not applied for.

A company may pay a commission to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares in the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares in the company, if--

- (a) the payment of the commission is authorised by the Articles ; and
- (b) the commission paid or agreed to be paid does not exceed 10 per cent. of the price at which the shares are issued, or the amount or rate authorised by the Articles, whichever is the less ; and
- (c) the amount or rate per cent. of the commission paid or agreed to be paid is—
 - (i) in the case of shares offered to the public for subscription, disclosed in the prospectus ; or
 - (ii) in the case of shares not offered to the public for subscription, disclosed in the statement in lieu of prospectus, or in a statement in the prescribed form signed in like manner as a statement in lieu of prospectus and delivered before the payment of the commission to the registrar of companies for registration, and, where a circular or notice, not being a prospectus, inviting subscription for the shares is issued, also disclosed in that circular or notice ; and
- (d) the number of shares which persons have agreed for a commission to subscribe absolutely is disclosed in manner aforesaid (§ 43 (1)).

Save as above, a company must not apply any of *its shares or capital money* either directly or indirectly in payment of any commission, discount, or allowance, to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares of the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares in the company, whether the shares or money be so applied by being added to the purchase money of any property acquired by the company or to the contract price of any work to be executed for the company, or the money be paid out of the nominal purchase money or contract price, or otherwise (§ 43 (2)).

These requirements do not affect the power of any company to pay such brokerage on placing shares as is paid by general custom to stockbrokers in respect of applications bearing their stamp.

A vendor to, promoter of, or other person who receives payment in money or shares from a company has and always has had power to apply any part of the money or shares so received in payment of any commission, the payment of which, if made directly by the company, would have been legal.

If default is made in delivering to the registrar the statement in the prescribed form, the company and every officer of the company who is in default is liable to a fine not exceeding £25 (§ 43).

An agreement to procure subscriptions, whether absolute or conditional, involves no liability on the part of the party undertaking to procure the subscriptions in the event of subscriptions not being procured.

The commission can be paid by a private company, or in the reconstruction of a public company. It

may be paid by the company itself, or by a vendor or promoter of the company.

The payment may be made on an **ABSOLUTE** agreement to take shares, *i.e.*, to an original allottee; or on a **CONDITIONAL** agreement, *i.e.*, to an underwriter.

If the payment be made by the company, then in the case of a private company, the amount or rate per cent. of the commission must be authorised by the Articles, and disclosed in a statement in the prescribed form signed in the same manner as the statement in lieu of prospectus.

In the case of a public company, the same particulars must be authorised by the Articles, and, if there be an offer of shares or debentures to the public, disclosed in the prospectus. If there be no offer to the public, the disclosure must be made for the first issue in the statement in lieu of prospectus; for subsequent issues in a statement in the prescribed form. The particulars must also be disclosed in any notice or circular inviting subscriptions.

Apparently the commission may be paid by the issue of shares to the underwriters, in the same way as a debt due by the company may be discharged by the issue of shares.

The commission on underwriting may be paid, not only by the company itself, but by the vendors; but the vendors must in this case comply strictly with the conditions stated above.

The section does not prohibit or qualify the power of a company to apply its **PROFITS** as it pleases in the payment of commissions. It would appear, therefore, that, subject to its Articles, a company has an unrestricted right to pay commissions out of accumulated profits, so long as the provisions of § 45 (*see § 8 below*), are not thereby violated.

It will be noticed that the Act allows this commission to be paid, not only to underwriters strictly speaking, but also to original allottees. Such a payment must be distinguished from an issue of shares AT A DISCOUNT (*see* Chap. VII, § 24), in which case the allottee is never liable for more than the discount value of the shares. Where shares are allotted subject to the payment of a commission, the allottee is liable for their full nominal value and has merely a cross-right for the commission. The difference may be material in a winding-up of the company.

The agreement that the underwriter should have an option to subscribe for further shares at par in consideration of his underwriting shares, is not an application of shares or capital money in payment of commission within the meaning of § 43 (2) (*Hilder v. Dexter* (1902), A.C. 474).

The utilisation of a premium on shares for the payment of underwriting commission can, however, only be resorted to if the conditions of the section are complied with; since such premium, though not forming part of the capital, is nevertheless capital money (*Shorto v. Colwill* (1909), 101 L.T. 598).

It is not necessary for a company to take power to pay the usual brokerage for placing shares, this having always been lawful (*Metropolitan Coal Consumers' Association v. Scrimgeour* (1895), 2 Q.B. 604).

Commission on the issue of debentures may be paid unless forbidden by the Memorandum or Articles; and the debentures can be issued at a discount.

An agreement that debentures issued at a discount may subsequently be exchanged for fully-paid shares is void, as this would have the effect of

illegally issuing such shares at a discount (*Mosely v. Koffyfontein Mines* (1904), 2 Ch. 108), unless the provisions of § 47 are complied with. If, of course, the debentures were due for repayment at par, fully paid shares of a nominal value equal to or less than, the amount due to the debenture holders could validly be issued.

In order to secure disclosure of the fact that underwriting commission has been paid in respect of shares or debentures, the amount or rate per cent. must be stated in the prospectus or statement in lieu of prospectus, or in a statement in the prescribed form (Fourth and Fifth Schedules, § 43).

The total amount paid by way of commission must also be stated in the annual return, together with any discount on debentures (§ 108).

Where a company has paid any sums by way of commission in respect of any shares or debentures, or allowed any sums by way of discount in respect of any debentures, the total amount so paid or allowed, or so much thereof as has not been written off, must be stated in every balance sheet of the company until the whole amount thereof has been written off. If default is made in this respect, the company and every officer of the company who is in default is liable to a fine not exceeding £5 a day (§ 44).

§ 8.—Financial Assistance.

To prevent the illusory expansion of the capital of a company, it is enacted by § 45 (1) that, subject as provided by the section, it is not lawful for a company to give, whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance

for the purpose of or in connection with a purchase made or to be made by any person of any shares in the company.

This provision does not, however, prohibit—

- (a) where the lending of money is part of the ordinary business of a company, the lending of money by the company in the ordinary course of its business ;
- (b) the provision by a company, in accordance with any scheme for the time being in force, of money for the purchase by trustees of fully-paid shares in the company to be held by or for the benefit of employees of the company, including any director holding a salaried employment or office in the company ;
- (c) the making by a company of loans to persons, other than directors, *bonâ fide* in the employment of the company with a view to enabling those persons to purchase fully-paid shares in the company to be held by themselves by way of beneficial ownership.

The aggregate amount of any outstanding loans made under (b) and (c) above must be shown as a separate item in every balance sheet of the company.

If a company acts in contravention of these requirements, the company and every officer of the company who is in default is liable to a fine not exceeding £100 (§ 45).

A voluntary transfer of shares in a company to a trustee for the benefit of the company is not invalid, and the trustee may vote in respect of such shares as the company may direct (*Kirby v. Wilkins* (1929), 2 Ch. 444).

§ 9.—Commencement of Business.

A private company is entitled to commence business and to exercise its various powers immediately it is incorporated. This privilege is enjoyed also by companies constituted without a share capital. In the case of a company having a share capital, restrictions are contained in § 94, which provides that such a company shall not commence any business or exercise any borrowing powers unless :—

(1) In the case of a company which has issued a prospectus inviting the public to subscribe for its shares :

- (a) shares held subject to the payment of the whole amount thereof in cash have been allotted to an amount not less in the whole than the minimum subscription ; and
- (b) every director of the company has paid to the company on each of the shares taken or contracted to be taken by him, and for which he is liable to pay in cash, a proportion equal to the proportion payable on application and allotment on the shares offered for public subscription ; and
- (c) there has been delivered to the registrar of companies for registration a STATUTORY DECLARATION by the secretary or one of the directors, in the prescribed form, that the aforesaid conditions have been complied with.

(2) In the case of a company which has not issued a prospectus inviting the public to subscribe for its shares :

- (a) there has been delivered to the Registrar of Companies for registration a statement in lieu of prospectus ; and

- (b) every director of the company has paid to the company on each of the shares taken or contracted to be taken by him and for which he is liable to pay in cash, a proportion equal to the proportion payable on application and allotment on the shares payable in cash ; and
- (c) there has been delivered to the registrar of companies for registration a STATUTORY DECLARATION by the secretary or one of the directors in the prescribed form that paragraph (b) above has been complied with.

The registrar of companies must, on the delivery to him of the statutory declaration, and, in the case of a company which is required to deliver a statement in lieu of prospectus, of such a statement, certify that the company is entitled to commence business, and that certificate is conclusive evidence that the company is so entitled.

Any contract made by a company before the date at which it is entitled to commence business is provisional only, and not binding on the company until that date, and on that date it becomes binding.

Nothing in the above requirements prevents the simultaneous offer for subscription or allotment of any shares and debentures or the receipt of any money payable on application for debentures.

If any company commences business or exercises borrowing powers in contravention of these requirements, every person who is responsible for the contravention is, without prejudice to any other liability, liable to a fine not exceeding £50 for every day during which the contravention continues.

The provisions do not apply to—

- (a) a private company ; or
- (b) a company registered before the 1st January, 1901 ; or
- (c) a company registered before the 1st July, 1908, which has not issued a prospectus inviting the public to subscribe for its shares.

Since any contract entered into by a company after incorporation, but before it is entitled to commence business, is provisional only, it follows that if a company should be wound up before it becomes entitled to commence business, it is not liable on any of its contracts. Thus, at the request of the directors a person entered into contracts for furnishing the offices of a company ; the company went into liquidation before becoming entitled to commence business ; no portion of the expenses could be claimed in the liquidation (*Re Otto Electrical Manufacturing Co.* (1906), 2 Ch. 390).

It may here be observed that if, at any time, the registrar has reason to believe that a company is not carrying on business, he is empowered to adopt the procedure prescribed by § 295 of the Act and to strike the company's name out of the register as being defunct.

Moreover, if a company does not commence business within a year after its incorporation, that is a ground for petitioning the Court to make a winding-up order against the company (§ 168).

SYNOPSIS OF CHAPTER VII.

THE SHARE CAPITAL.

§ 1 — SHAREHOLDERS

2 — ACQUISITION OF MEMBERSHIP

(1) Subscription of the Memorandum

(2) Agreement and Registration

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8 — CLASSES OF SHARES

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9 — ALTERATION OF RIGHTS ATTACHING TO SHARES

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CHAPTER VII

THE SHARE CAPITAL.

§ 1.—Shareholders.

In the normal case where a company is registered with a share capital, membership of the company will be denoted by the holding of shares in it. Where there is no share capital, the members are not also shareholders and their rights are defined otherwise than in relation to shares in the company.

Before examining the character and structure of the share capital of a company it is necessary to consider how membership may arise and in what circumstances it may determine.

§ 2.—Acquisition of Membership.

(1) SUBSCRIPTION OF THE MEMORANDUM.

Section 25 (1) of the Act provides that the subscribers of the Memorandum of a company are deemed to have agreed to become members of the company, and on its registration must be entered as members in its register of members (*see* Chap. XI, § 1).

A subscriber to the Memorandum becomes a member the moment registration takes place, without being placed on the register (*Tyddyn Sheffrey Slate Quarries Co.* (1868), 20 L.T. 105). Allotment of a signatory's shares is unnecessary, as he is bound by virtue of his subscription to take and pay for them. He can

escape this obligation only if all the shares are allotted to other persons (*Tufnell's Case* (1885), 29 Ch. D. 421). The fact that he has been fraudulently induced to sign is no ground for rescission, since he cannot have been deceived by the company, which did not exist at the time he signed (*Lord Lurgan's Case* (1902), 1 Ch. 707).

(2) AGREEMENT AND REGISTRATION.

Section 25 (2) of the Act provides that, apart from the subscribers of the Memorandum, "every other person who agrees to become a member *and whose name is entered on the register of members*, shall be a member of the company." It follows that, except in the case of the subscribers of the Memorandum, the relationship of member and company is not perfectly constituted until the projected member's name is duly recorded in the register of members. Without registration, the rights of membership cannot be asserted nor the liabilities thereof imposed; and a contract to take shares may be rescinded by the *mutual* consent of the company and an allottee (*Nicol's Case* (1885), 29 Ch. D. 421), there being in such a case no infraction of the rule that a company cannot take back its own shares, for the allottee has never been completely established as a shareholder. Registration can be compelled, in proper cases, by application to the Court for rectification of the register of members under § 100 of the Act.

Registration of the name of a person as a member of a company may result from one or other of the following :—

(a) Application and Allotment.

A notice of allotment after an application for shares gives rise to a contractual relationship between

the company and the applicant. The prospectus is a mere notice that the company is prepared to receive applications for shares, the application itself being an offer, and the allotment forming an acceptance. It is essential, therefore, that the allotment should not differ in terms from the application, otherwise no contract is formed (*Barrett's Case* (1865), 3 De G. J. & S. 30; *Jackson v. Turquand* (1869), L.R. 4 H.L. 305). Thus, to allot a smaller number of shares than the number applied for does not constitute a contract between the company and the applicant unless the terms of the application authorise such an allotment (*ex parte Roberts* (1852), 1 Drew 204). Until allotment has actually taken place, the applicant may revoke his offer to take shares, revocation being communicated in some way to the secretary, or to some person in the registered office if the secretary is absent (*Truman's Case* (1894), 3 Ch. 272; *Crawley's Case* (1869), 4 Ch. App. 322). A revocation by post will only be effective when it is actually delivered to the company (*Henthorn v. Fraser* (1892), 2 Ch. 27).

Generally speaking, the post can be regarded as the ordinary method of communication between the company and the applicant; this being so, the contract between the company and the applicant will be completed as soon as the letter of allotment is posted (*Household Fire Insurance Company v. Grant* (1879), 4 Ex D. 216). It is not sufficient, however, to hand the letter of allotment to a postman, who is unauthorised to receive letters, since, if this is done, the postman would be the company's own agent, and there will be no communication of acceptance to the applicant until the letter is actually in the course of post or has been delivered to the allottee (*London & Northern Bank* (1900), 1 Ch. 220).

If the shares are applied for and allotted in the name of a fictitious person, the person who applied in that name is liable on the shares, *e.g.*, where a trader takes up shares in a "business" name (*Central Klondyke Gold Mining Co.* (1899), W.N. 1).

(b) Voluntary Transfer.

A transfer from one shareholder to another is evidenced by means of a transfer form, duly executed by the transferor and the transferee; the transfer form must be properly stamped, and is given effect by registration in the register of members after being passed by the directors of the company.

Notwithstanding anything in the Articles it is not lawful for the company to register a transfer of shares in the company unless a proper instrument of transfer has been delivered to the company; this provision, however, does not prejudice any power of the company to register as shareholder any person to whom the right to any shares in the company has been transmitted by operation of law (§ 63), *e.g.*, upon the death or bankruptcy of the prior holder.

(c) Transmission by Operation of Law.

Where a person dies, becomes lunatic, or bankrupt, the executors or administrators in the case of death, the committee in the case of lunacy, and the trustee in the case of bankruptcy, become entitled to deal with the shares.

Subject to the Articles, such persons are entitled to receive on behalf of the estate all dividends, etc., and must make provision out of the estate to satisfy calls; but they are not themselves members, and are accordingly not *personally* liable for calls unless they require to be and are formally registered as the holders

of the shares. Unless and until the representative takes the shares into his own name, he will not, unless the Articles provide otherwise, be entitled to receive notices from the company (*James v. Buena Ventura Syndicate* (1896), 1 Ch. 456; *Allen v. Gold Reefs of West Africa* (1900), 1 Ch. 656). The legal personal representative is entitled, nevertheless, to exercise on behalf of the estate the rights of a dissentient shareholder under § 234 of the Act (*Llewellyn & Kasintoe Rubber Estates* (1914), 2 Ch. 670).

If an executor registers probate, a statement that he is a trustee cannot be recorded in the register of members, since no notice of any trust, express, implied, or constructive, can be entered on that register (§ 101).

The personal representative will prove his title by production of probate or letters of administration. In the case of bankruptcy, the trustee's certificate should be produced; and in the case of lunacy, the order appointing the committee. The fact of production should be endorsed on the essential document and noted in the register of members, and in the register of probates, etc., if one is kept.

The shares may be the subject of a bequest, in which case the legatee will have the shares transferred to him by the legal personal representative in due course.

Alterations in the Articles, duly effected by special resolution, bind persons who become members prior to the alteration as if these alterations were originally contained in the Articles. Thus, a provision in the Articles as altered for the transfer under compulsion of the shares of a bankrupt member at a fixed price is valid provided the price is reasonable (*Borland's Trustees v. Steel Brothers* (1901), 1 Ch. 279).

(d) Estoppel.

This arises where a person already on the register knowingly allows his name to remain on the register when he has actually parted with his shares, or when he otherwise holds himself out as a member.

An agreement to place shares does not make a person a member, as he has not agreed to take them up (*Gorriessen's Case* (1873), L.R. 8 Ch. 507).

§ 3.—Cessation of Membership.

A person ceases to be a member of a company when his name is removed from the register of members for sufficient reason, *viz.*,

- (a) TRANSFER of the shares held by him ;
- (b) DEATH of the shareholder ;
- (c) DISCLAIMER by his trustee in bankruptcy ;
- (d) FORFEITURE for non-payment of calls ;
- (e) SURRENDER in circumstances justifying forfeiture ;
- (f) LIEN of the company followed by SALE of the shares under powers conferred by its Articles ;
- (g) RESCISSION of the contract of shareholding on the ground of misrepresentation ;
- (h) AVOIDANCE OF THE ALLOTMENT on the ground of irregularity ;
- (i) REDEMPTION of redeemable preference shares ;
- (j) DISSOLUTION of the company.

Membership is presumed to continue until removal of the member's name from the register. Prior to such removal, the member would be *prima facie* entitled to vote at meetings of the company, but must in any case vote as directed by the persons beneficially

interested in the shares (*Wise v. Lansdell* (1921), 37 T.L.R. 167).

Provision is sometimes made in the Articles of a company for the expropriation of shares held by a member or members in certain circumstances. This consists in the transfer of the shares of a member irrespective of his assent at a price fixed in accordance with the provisions of the Articles. The Courts are reluctant to enforce an expropriation which would result in the infliction of hardship on the member concerned without a corresponding advantage accruing to the company. In the case of private companies involving family interests, the Articles often provide for the acquisition by the other shareholders or their nominees of the shares of a deceased or bankrupt member at a price stated in the Articles or to be otherwise determined. (See *Borland's Trustees v. Steel Bros.*, *supra*.)

The following judicial decisions serve to illustrate the attitude of the Court in the event of contemplated expropriation :—

- (1) A majority of shareholders, having failed to purchase by agreement shares held by a minority, attempted to alter the Articles so as to give power to a majority of nine-tenths of the issued capital (*i.e.*, themselves), to acquire compulsorily the shares of such minority. The Court not being satisfied that the proposed alteration was for the benefit of the company as a whole, and entertaining the view that the proposed action was likely to be oppressive and unfair to the minority, granted an injunction restraining the majority from so altering the Articles (*Brown v. British Abrasive Wheel Co.* (1919), 1 Ch. 290).

- (2) Provision in the Articles empowering the directors of a private company to purchase, at a fair valuation, the shares of a member who carries on a competitive business, may be validly applied, so long as the power is exercised *bonâ fide* and in the interests of the company (*Sidebottom v. Kershaw, Leese & Co.* (1920), 1 Ch. 154).
- (3) A clause in the Articles of a private company giving power to a majority of its shareholders to expropriate any shareholders without regard as to whether such expropriation would operate to the advantage of the company as a whole, was held to be too wide in its application and therefore invalid (*Dafen Tinplate Co. v. Llanelly Steel Co.* (1920), 2 Ch. 124).
- (4) An original Article requiring a member who failed to comply with certain trade regulations to sell £1 shares for 1/- was held to be binding (*Phillips v. Manufacturers Securities* (1917), 116 L.T. 290).

§ 4.—Nature of Shares.

The shares of a company are deemed to be personal estate of the holders, and are transferable subject only to such restrictions as may be contained in the Articles of the company. It has already been seen that an effective transfer of shares *inter vivos* involves the execution of an instrument of transfer. In the case of companies having a share capital, each share must be distinguished by its appropriate number (§ 62).

A share has been defined as “the interest of a shareholder in the company measured by a sum of

money for the purpose of liability in the first place, and of interest in the second, but also consisting of a series of mutual covenants entered into by all the shareholders *inter se*" (*Borland's Trustees v. Steel Bros.* (1901), 1 Ch. 279).

This is evidenced by a share certificate which, if issued by a company under its common seal, specifying any shares held by any member, is *prima facie* evidence of the title of the member to the shares (§ 68).

§ 5.— Estoppel by Share Certificate.

While a share certificate is *prima facie* evidence of the title of the member to the shares, it is not of itself conclusive evidence of title, and where a company in error or by reason of some fraud issues a share certificate to a person who is not in fact entitled to the shares specified, the mere issue of the certificate does not constitute that person a holder of the shares. If, however, a person is induced to take a transfer of shares and to part with the purchase consideration, in reliance upon a share certificate issued in due form, the company is estopped from denying the truth of the statements contained in the certificate (*Bahia & San Francisco Railway Company* (1868), 3 Q.B. 584; *Ottos Kopje Diamond Mines* (1893), 1 Ch. 618).

Thus, where a share certificate is issued by the company to A PERSON WHO HAS LODGED A FORGED TRANSFER, the company is not, as against that person, estopped from denying his title, because HE HAS NOT ACTED ON THE STRENGTH OF THE CERTIFICATE, and the name of the true owner must be restored to the register; but should the person who has so obtained it, transfer the shares to a *bona fide* PURCHASER WHO ACTS ON THE STRENGTH OF THE CERTIFICATE, which

states that the transferor is entitled to the shares named, then the company, though it cannot register the transferee, must indemnify him in the value of the shares, because it is estopped from denying the truth of the statement (*Balkis Co. v. Tompkinson* (1893), A.C. 396).

D. applied to L., a stockbroker, and the secretary of a company, for 300 shares in the company. L.'s clerk, who owned no shares in the company executed what purported to be a transfer of 300 shares to D. The company registered the transfer and issued a certificate to the transferee without requiring the production of a certificate from the clerk. The company was estopped from denying the validity of the certificate issued to D. and was liable to D. in damages (*Dixon v. Kennaway* (1900), 1 Ch. 833).

The certificate must, however, be issued by the company, or by some one acting with the authority of the company; therefore where a secretary forged the signatures of the directors to a certificate, and fraudulently affixed the company's seal, the company, *not having issued* the forged certificate, was not estopped from denying that the holder was entitled to be placed on the register (*Ruben v. Great Fingall Consolidated Co.* (1906), A.C. 439).

Where the certificate states that the shares are fully paid, the company is estopped from denying that they are fully paid as against a person who has *bonâ fide* acted on the strength of the statement (*Bloomenthal v. Ford* (1897), A.C. 156).

No estoppel can arise out of inaccurate statements made in a share certificate as regards any person who is aware of the inaccuracy. Thus, an original allottee cannot, as a rule, estop the company from denying

that the shares allotted are fully paid even where the share certificate so describes them ; for if in fact the full value of the shares has not been paid by the allottee he must be cognisant of the inaccuracy in the certificate. It might be otherwise, however, where the allottee has paid the full amount but it has not been applied in paying up the shares allotted and the company has, notwithstanding, issued a certificate for fully paid shares. In such case it has been held that an estoppel exists preventing the company from alleging that the shares are not fully paid even though the allottee was a firm of which a partner was also a director of the company who signed the share certificate, but without actual knowledge of the true facts (*In re Coasters Ltd.* (1911), 1 Ch. 86).

§ 6.—Issue of Share Certificates.

Unless the conditions of issue otherwise provide, share or debenture certificates must be completed and ready for delivery within two months of allotment, or of the date on which a valid transfer has been lodged, under a penalty not exceeding £5 a day on the company and every director, manager, secretary or other officer who is knowingly a party to the default (§ 67).

If the company refuses to register a transfer, it must within two months after the date of lodgment of the transfer, send to the transferee notice of the refusal, under penalties for default similar to the above (§ 66).

If a company makes default in the issue of the certificate, the aggrieved party may serve a notice requiring compliance with the Act, and if the default is not made good within ten days after the service of

the notice, the Court may make an order directing the company and any officer thereof to rectify the omission within a time to be specified in the order, and may direct that all costs of the application shall be borne by the company or by any officer of the company responsible for the default (§ 67).

The certificate is numbered and specifies the name of the person to whom it is issued, the number of shares it represents and the distinctive numbers of such shares, and shows to what extent the shares are paid up. It is sealed with the common seal of the company, which is authenticated as required by the Articles, usually by the signature of two directors and the secretary. The certificate does not require any revenue stamp.

There must be no entry on the certificate that the company has a lien on the shares (*W. Key & Son* (1902), 1 Ch. 467).

§ 7.—Share Warrants.

A company limited by shares may, if authorised by its Articles, issue share warrants with regard to fully paid-up shares. These must be under the seal of the company, and are negotiable instruments passing by delivery. The warrant must state that the bearer of the warrant is entitled to the shares therein specified, and may provide, by coupons or otherwise, for the payment of the future dividends on the shares included in the warrant (§ 70).

On the issue of a share warrant the company must strike out of its register of members the name of the member then entered therein as holding the shares specified in the warrant as if he had ceased to be a

member, and enter in the register the following particulars :—

- (a) the fact of the issue of the warrant ;
- (b) a statement of the shares included in the warrant, distinguishing each share by its number ; and
- (c) the date of the issue of the warrant.

The bearer of a share warrant, subject to the Articles of the company, is entitled, on surrendering it for cancellation, to have his name entered as a member in the register of members.

The company is responsible for any loss incurred by any person by reason of the company entering in the register the name of a bearer of a share warrant in respect of the shares therein specified without the warrant being surrendered and cancelled.

Until the warrant is surrendered, the particulars specified above are deemed to be the particulars required by the Act to be entered in the register of members ; and, on the surrender, the date of the surrender must be entered.

A warrant-holder is not in the strict sense a member as his name does not appear in the register ; he cannot, therefore, claim to exercise the rights derived from membership, such as voting at meetings, merely by virtue of his holding of the warrant. The Articles may, however, provide that the bearer of a share warrant shall be deemed to be a member of the company within the meaning of the Act, either to the full extent or for any purposes defined in the Articles (§ 97). In such case the Articles will prescribe the regulations to be satisfied to entitle the warrant-holder to exercise the normal rights of a member, *e.g.*, that the warrant be deposited at the

registered office of the company at a specified period prior to a general meeting at which the bearer of the warrant desires to attend and vote.

For the purpose of any provision in the Articles requiring a director or manager to hold a specified share qualification, the bearer of a share warrant is not deemed to be the holder of the shares specified in the warrant (§ 141 (2)).

If any person falsely and deceitfully personates any owner of any share or interest in any company or of any share warrant or coupon, issued in pursuance of the Act, and thereby obtains or endeavours to obtain any such share or interest or share warrant or coupon, or receives or endeavours to receive any money due to any such owner, as if the offender were the true and lawful owner, he is guilty of felony, and on conviction thereof is liable, at the discretion of the Court, to be kept in penal servitude for life or for any term not less than three years (§ 71).

The forgery of a share warrant or the unlawful engraving of any share warrant is a felony, and the offender is liable to penal servitude for a term not exceeding 14 years (Forgery Act, 1913, §§ 2, 9).

Private companies cannot issue share warrants or take power in their Articles to issue them, since there can be no restriction on transfer of share warrants, and their negotiable character is necessarily inconsistent with § 26 (i) (a), of the Act, defining a private company.

Share warrants must be stamped with an impressed stamp of the value of treble the duty on a transfer by deed of the shares represented by it at their nominal value (Stamp Act, 1891, § 1).

A company may also issue stock warrants to bearer (*Pilkington v. United Railways of Havana and Regla Warehouses* (1930), 2 Ch. 108), i.e., after shares have been converted to stock (see § 16 of this chapter).

§ 8.—Classes of Shares.

The shares of a company need not necessarily be all of the same amount, nor is it necessary that the holders should all enjoy the same rights. It is frequently found that the capital of a company is divided into preferred, ordinary, and founders' or deferred shares. These terms have no specific legal significance, but are employed to denote the distinctive attributes attaching to the different classes of shares which normally constitute the capital of a company. Thus, the preference shares are entitled to receive dividends at a fixed rate out of available profits before dividends can be paid to ordinary shareholders; while the holders of deferred shares can receive no dividends until the rights of the ordinary shareholders are, in that regard, exhausted.

The rights attaching to particular classes of shares may be given either by the Memorandum or the Articles, but if the rights are given by the Memorandum they cannot subsequently be varied by the Articles (*Ashbury v. Watson* (1885), 30 Ch. D. 376), unless the Memorandum itself gives the power to vary or alter such rights (*Underwood v. London Music Halls* (1901), 2 Ch. 309).

Unless the Memorandum expressly provides otherwise, a company can at any time take power to issue shares with preferred or deferred rights (*Andrews v. Gas Meter Co.* (1897), 1 Ch. 361).

At one time it was thought that where the original Memorandum or Articles did not authorise shares being issued with preferential rights, the Articles could not be varied so that preference shares could be issued (*Hutton v. Scarborough Cliff Hotel Co.* (1865), 2 Dr. & Sm. 514), and that where it was desired to do this,

it would be necessary either to obtain the assent of all the existing members of the company, or to reconstruct. It has since, however, been held to be within the power of a company, in such a case to issue a portion of the original shares with preferential rights attached thereto (*British and American Trustee Corporation v. Couper* (1894), App. Cas. 399), or upon an increase of capital, to issue new shares with such preferential rights (*Andrews v. Gas Meter Co.*, *supra*).

Even where the Memorandum confers, but does not authorise the variation of the rights of the various classes of shareholders, it is possible to vary such rights by procedure under § 153 of the Act. (See Chap. XIV.)

It is advisable that the rights should be contained in the Articles, and not in the Memorandum, so as to facilitate variation when required, a special resolution sufficing in such case to effect the desired modifications, subject only to certain statutory safeguards for minority interests (*see* § 9 *infra*).

(a) Preference Shares.

The shares may be preferential as regards dividend, *i.e.*, they may be entitled to a fixed rate per cent. before any dividend is paid to other classes of shareholders; and it may then be necessary to determine whether such dividend is to be cumulative (*i.e.*, any arrears owing to the deficiency of profits of any one year are to be made good out of the profits of subsequent years), or is to be non-cumulative (*i.e.*, contingent as regards each year upon the profits of that year having been sufficient to pay a dividend for that year).

Prima facie where the clause defining the preferential rights declares that the preference shares are to be entitled to a preferential dividend at a specified rate per cent., the dividend is cumulative (*Webb v. Earl* (1875), 20 Eq. 556; *Foster v. Coles and M. B. Foster & Sons* (1906), W.N. 107; *Ferguson & Forrester, Ltd., v. Buchanan* (1920), S.C. 154); but if there are limiting words in the Articles, as for instance a preferential right to dividend out of the PROFITS OF EACH YEAR, showing that it is intended that the dividend shall only be payable out of the profits of the particular year, then the Court will give effect to it (*Staples v. Eastman Photographic Materials Co.* (1896), 2 Ch. 303).

It must be emphasised that no member is entitled to a dividend merely because profits have been made; no right to claim payment of a dividend arises until a dividend has been declared as provided by the Articles, and it has been held that a preference shareholder's right to dividend, unless there is an express provision in the Articles or terms of issue, is subject to the rights of the directors to provide reserves (*Bond v. Barron Hæmatite Steel Co.* (1902), 1 Ch. 358; see also Chap. XII, § 6).

A preference shareholder is not entitled to preference in respect of a return of capital on winding-up unless the Memorandum and Articles expressly provide for this (*Driffeld Gas Light Co.* (1898), 1 Ch. 451). In the absence of such a provision the whole of the preference shares will rank for return of capital *pari passu* with the ordinary shares. Where a preference as to capital does exist, the preference shareholders must, in the event of a winding-up, be paid off out of any assets remaining after all creditors and expenses

of liquidation have been paid, in priority to the ordinary shareholders.

Where preferential rights either as to capital or dividend are given, the question has frequently arisen as to whether the preference shareholders possess any further right to participate in the distribution of surplus assets which may result upon winding-up of the company. "Surplus assets" means what is left after the payment of debts and expenses and the repayment of the whole of the preference and ordinary share capital. The terms of the Memorandum and Articles must be inspected, so as to interpret the conditions of issue and the rights of the several classes of shareholders. The question is in each case one of the construction of the relevant provisions in those documents. The fundamental principle has been judicially declared in *Re William Metcalfe & Sons* ((1933), Ch. 142), to the effect that *all* the joint stockholders are entitled to rank *pari passu* in the distribution of surplus assets and that *this right can* be qualified only by clear provision to the contrary. Prior to the judgment of the Court of Appeal in that case, judicial decisions were conflicting, *e.g.*, *Collaroy Co. v. Giffard* ((1928), 1 Ch. 144), and *Re Fraser & Chalmers, Ltd.* ((1919), 2 Ch. 114).

The judgment in *Re William Metcalfe & Sons* (*supra*), quoted with approval the statement of Lord Herschell in *Birch v. Cropper* ((1889), 14 A.C. 525, 538): "When the whole of the capital has been returned both classes of shareholders are on the same footing, equally members, and holding equal shares in the company, and it appears to me that they ought to be treated as equally entitled to its property," and held that UNLESS THERE EXISTED SPECIFIC PROVISION TO DISPLACE OR LIMIT THE NORMAL RIGHTS OF THE PREFERENCE

SHAREHOLDERS IN RESPECT OF SURPLUS ASSETS, THE RULE OF PARITY MUST PREVAIL.

Preference shareholders will not be entitled to any arrears of dividend in liquidation where such dividends have not been declared (*Crichton's Oil Co.* (1902), 2 Ch. 86), unless the Articles provide otherwise (*Bridgewater Navigation Co.* (1891), 2 Ch. 317).

Where definite provisions are contained in the Articles that the preference shareholders are to be entitled upon a winding-up, after repayment of their capital, TO HAVE THE SURPLUS ASSETS APPLIED IN PAYING OFF ANY ARREARS of preferential dividend, such right will be enforceable even though no profits had ever been earned by the company in question (*In re Springbok Agricultural Estates Ltd.* (1920), 1 Ch. 563). There have been conflicting judgments, however, and doubts still exist as to the law on this point, e.g., in *Re Roberts & Cooper* ((1929), 2 Ch. 383), the Memorandum provided that the preference shareholders should receive the amounts paid upon their shares together with "ARREARS OF DIVIDEND DUE," and it was held that as no dividend had been declared none was due, and therefore the preference shareholders were not entitled to arrears of dividend. Here also, as in the cases culminating in *Re William Metcalfe & Sons* (*supra*), the difficulties which have arisen depend upon the particular view which has been taken by the Courts in different cases in construing the terms of the Memorandum and Articles.

Participating preference shares, are such as entitle the holders to a fixed dividend in priority to the ordinary shareholders (after which the ordinary shareholders will take a dividend at a fixed rate), and to participate with the ordinary shareholders in the

distribution of any further profits available for dividend in the proportion fixed by the regulations of the company. It is clear that the existence of participating preference shares as part of the capital of a company, involves that the rate of dividend which may in the first place be declared upon the ordinary shares is subject to a prescribed limit.

In the case of companies other than private companies, whether or not preference shareholders are entitled to receive notices of general meetings, a preference shareholder can claim to be furnished, without charge, within seven days of making a demand therefor, with a copy of the last balance sheet of the company including a copy of any document required by law to be annexed thereto and of the auditor's report. In the case of private companies, a charge of sixpence for every 100 words may be made (§ 130).

A company limited by shares may, if so authorised by its Articles, issue preference shares which are, or at the option of the company are to be liable, to be redeemed.

No such shares can be redeemed except out of profits of the company which would otherwise be available for dividend or out of the proceeds of a fresh issue of shares made for the purposes of the redemption; and no shares can be redeemed unless they are fully paid.

Where shares are redeemed otherwise than out of the proceeds of a fresh issue, there must, out of profits which would otherwise have been available for dividend, be transferred to a reserve fund, to be called "the capital redemption reserve fund," a sum equal to the amount applied in redeeming the shares, and the provisions of the Act relating to the reduction of the share capital of a company apply as if the capital redemption reserve fund were paid-up share capital of the company (§ 46 (1)).

Where shares are redeemed out of the proceeds of a fresh issue, the premium, if any, payable on redemption, must have been provided for out of the profits of the company before the shares are redeemed (§ 46 (1) (d)).

There must be included in every balance sheet of a company which has issued redeemable preference shares a statement specifying what part of the issued capital of the company consists of such shares and the date on or before which those shares are, or are to be liable, to be redeemed. If a company fails to comply with this provision, the company and every officer of the company who is in default is liable to a fine not exceeding one hundred pounds (§ 46 (2)).

The redemption of preference shares may be effected on such terms and in such manner as may be provided by the Articles of the company, subject to the provisions stated above (§ 46 (3)).

Notice of the redemption, specifying the shares redeemed, must be given to the registrar of companies within one month (§ 51).

Where a company has redeemed or is about to redeem any preference shares, it has power to issue shares up to the nominal amount of the shares redeemed or to be redeemed as if those shares had never been issued, and the share capital of the company is not for the purposes of any enactments relating to stamp duty deemed to be increased by the issue of such new shares; but where new shares are issued before the redemption of the old shares, the new shares are not so exempted from stamp duty unless the old shares are redeemed within one month after the issue of the new shares (§ 46 (4)).

Where new shares are so issued, the capital redemption reserve fund may be applied by the company,

up to an amount equal to the nominal amount of the shares so issued, in paying up unissued shares of the company to be issued to members of the company as fully paid bonus shares (§ 46 (5)).

The object of the "capital redemption reserve fund" is to retain in the business out of assets representing profits an amount of assets equal to the share capital redeemed, *i.e.*, the assets originally acquired by the money raised on the issue of the shares redeemed are represented by this fund. Hence the provision regarding reduction of capital. When the cash used to redeem the shares has been replaced by a fresh issue, the Act allows the fund to be applied in issuing bonus shares, *i.e.*, to be used as capital. The reason for this last provision is somewhat obscure, since the creditors could not complain had the Act allowed the fund to be transferred back to profits; but it is worth noticing that § 46 (5) does not require the new issue to have been made for cash and there might therefore be a depletion of the real capital fund, if the consideration for the new issue was other than cash and proved inadequate while, at the same time, the capital redemption reserve fund was again treated as profits.

(b) Ordinary Shares.

Ordinary shareholders are those taking the surplus profits after all prior interests have been met; where there are deferred shares the ordinary shareholders will be entitled to a fixed rate of dividend before the holders of deferred shares receive any return. They may also be entitled to a proportion of the profits after the deferred shareholders have received a fixed portion or to participate in a stated ratio with the latter; the terms of issue and the Articles must be looked at to ascertain the rights attracting to the shares.

(c) Founders' or Deferred Shares.

Founders' or deferred shares are usually limited in number and of small nominal value, and are generally issued fully paid to the original vendors or promoters, or their nominees.

They rank for dividend after all other classes of shares have received the dividends to which they are entitled by the regulations of the company, and commonly take the whole or a very large proportion of the surplus profits after this has been done; moreover they may confer voting rights altogether, disproportionate to their actual nominal value. They are sometimes known as "management" shares.

Sometimes the subscribers are entitled, as an inducement to take shares, to the allotment of one founders' share for every so many ordinary shares allotted, in which case such shares are of course paid for in cash in the ordinary way.

The disadvantage of the existence of such shares is that there is an incentive to distribute all the profits which are made, for the benefit of the holders, instead of retaining some portion of the surplus profits by way of reserve. The directors can, however, transfer so much of the profits as they think fit to reserve, even though this may prevent any dividend being paid on the founders' shares (*Fisher v. Black and White Publishing Co.* (1901), 1 Ch. 174), and may carry profits forward or to reserve even without power in the Articles (*Burland v. Earle* (1902), A.C. 95).

Deferred shares are sometimes spoken of as being identical with founders' shares, but it must be remembered that whenever there are shares with a preference, all other shares are, in a sense, deferred.

A very common practice in recent years has been for companies to issue deferred shares of small nominal

value, usually one shilling, in the place of ordinary shares. The deferred shareholders are usually entitled to the whole of the profits after meeting obligations upon preference shares. In the case of industrial companies by whom they are usually issued, such shares are highly speculative in value.

Any prospectus must show the number of founders' or deferred shares, and the nature and extent of the interest of the holders in the property and profits of the company; the voting powers attached to various classes of shares and rights in respect of capital and dividends must also be stated (§§ 35 and 355, Fourth Sch., Part 1).

§ 9. -Alteration of Rights Attaching to Shares.

Where the rights, as between themselves, of the holders of various classes of shares are fixed by the Memorandum, these can be altered if the Memorandum so provides; and if the Memorandum gives the power, the mode of exercising the power may be indicated by the Articles (*Welsbach Incandescent Gas Co.* (1904), 1 Ch. 87).

Where PROVISION IS MADE BY THE MEMORANDUM OR ARTICLES for authorising the variation of the rights attaching to any class of shares, subject to the consent of any specified proportion of the holders of the issued shares of that class or the sanction of a resolution passed at a separate meeting of the holders of those shares, and, in pursuance of that provision, the rights attached to any class of shares are at any time varied, the holders of not less in the aggregate than 15% of the issued shares of that class being persons who did not consent to or vote in favour of the resolution for the variation, may apply to the Court to have the

variation cancelled. Should such an application be made, the variation does not have effect unless and until it is confirmed by the Court.

Application by the dissentients (or by one or more of them appointed by them in writing for the purpose) must be made to the Court within seven days after the date on which the consent was given or the resolution passed, as the case may be.

On any such application the Court, after hearing the applicant and any other persons who apply to the Court to be heard and appear to the Court to be interested in the application, may, if it is satisfied, having regard to all the circumstances of the case, that the variation would unfairly prejudice the shareholders of the class represented by the applicant, disallow the variation. If not so satisfied, the Court must confirm the variation. The decision of the Court on any such application is final.

The company must, within 15 days after the making of an order by the Court on any such application, forward a copy of the order to the registrar of companies under penalty of a fine not exceeding £5 a day during which the default continues, and a similar penalty attaches to every director, manager, secretary or other officer of the company who knowingly and wilfully authorises or permits the default (§ 61).

Where, however, NO POWER OF ALTERATION is given in the Memorandum or Articles, any proposed variation of the rights SPECIFIED IN THE MLMORANDUM, including a reorganisation of the share capital by the consolidation of shares of different classes, or by the division of shares into shares of different classes, or by a combination of both methods, must be effected in accordance with the provisions of § 153 of the Act.

Application must be made to the Court by the company or a member for a meeting of the members or class of members concerned, as the case may be ; the proposal must be approved by a majority in number representing three-fourths in value of the members or class of members present and voting personally or by proxy, and must then be sanctioned by the Court. The alteration will then be binding on the company and on the members or class of members, as the case may be.

An order so made has no effect until an office copy thereof has been filed with the registrar of companies, and a copy of every such order must be annexed to every copy of the Memorandum subsequently issued. Should default be made, the company, and every director, manager, secretary or other officer cognisant thereof is liable to a fine not exceeding £1 for each copy issued (§ 153).

The procedure under § 153 in regard to compromises or arrangements between a company and its shareholders or creditors, or a class of shareholders or of creditors, is considered in detail in Chapter XIV. For present purposes it is important to observe that, whether or not other means are available, the provisions of the section can be employed to modify or vary the rights attaching to shares or to any class of shares. Minority interests are protected in that the variation cannot become effective until sanctioned by the Court.

§ 10.—Calls.

After taking into account moneys paid in respect of shares upon application and allotment, the balance of the nominal value (or issued price) is often made payable, not at a time fixed by the terms of issue

but as and when a "call" is made. The amounts paid on application and allotment are not calls in-as-much as they are paid in accordance with specific stipulation and not in response to a demand by the company.

The amount of calls and the period at which they are to be made is determined to a certain extent by agreement between the members and the company, the prospectus and the Articles of the company usually containing provisions on this point.

The call must be made strictly in accordance with the provisions of the Articles, otherwise it will be invalid (*Cawley & Co.* (1889), 42 Ch. D. 209); but slight irregularities of procedure will not necessarily invalidate the call. For example, where the Articles contained a clause regularising acts performed in good faith by directors improperly appointed or disqualified from acting, and a call was made in all good faith at a meeting of directors, one of whom was disqualified at the time through having temporarily parted with his shares, the call was valid (*Dawson v. African Consolidated Co.* (1898), 1 Ch. 6).

A call is of the nature of a specialty debt (§ 20 (2)), and should it remain unpaid, it is enforceable against the shareholder at any time within 20 years from the date upon which it became payable.

A company, if so authorised by its Articles, may do any one or more of the following things :—

- (1) Make arrangements on the issue of shares for a difference between the shareholders in the amounts and times of payment of calls on their shares.
- (2) Accept from any member the whole or a part of the amount remaining unpaid on any

shares held by him, although no part of that amount has been called up.

- (3) Pay dividend in proportion to the amount paid up on each share where a larger amount is paid up on some shares than on others (§ 48).

There is, however, an implied equality between members, and the directors ought not (even with power to do so, except in a proper case) to make calls on some only of a class (*Galloway v. Hallé Concerts Society* (1915), 2 Ch. 233).

Calls may be paid in advance if the Articles so provide, and where this is done, interest can be paid on the sum so paid in advance, even though there are no profits (*Lock v. Queensland Investment Co.* (1896), A.C. 461).

In a winding-up, money paid in advance of calls is repayable with interest after the costs of winding-up and ordinary creditors have been paid, but before any return is made of the capital of the company to any class of shareholders (*Wakefield Rolling Stock Co.* (1892), 3 Ch. 165). Moneys received in advance of calls cannot, however, be repaid while the company is a going concern (*London & Northern Steamship Co. v. Farmer* (1914), W.N. 200), as such a course would amount to a reduction of capital which would necessitate the procedure outlined in § 55 of the Act. (See § 15 below.)

It is for the directors to decide whether a call is necessary, and the Court will not interfere when a call is made by them (*Bailey v. Birkenhead Railway Company* (1850), 12 Beav. 433) unless the object of the call is outside the scope of the Memorandum. The power to make calls must, however, be exercised by the directors *bonâ fide* and in the general interests of

the company (*New Zealand Gold Extraction Co. v. Peacock* (1894), 1 Q.B. 622), and not for the advantage of themselves or their friends (*Alexander v. Automatic Telephone Co.* (1900), 2 Ch. 56). The same principle governs the power to receive moneys in advance of calls. Thus where directors had paid in advance of a call the amount unpaid on their own shares in order that funds should be available to pay their fees, the directors were held still liable to pay the amount uncalled on their shares since the payment they had made was not one by which the company had benefited (*Sykes's Case* (1872), 13 Eq. 255).

If a shareholder is a creditor of the company for money payable at once, this can be set off against a call payable at once, without the formality of cash actually being handed over and back again (*Larocque v. Beauchemin* (1897), A.C. 358); but this right of set-off cannot be exercised where the company is being wound up.

§ 11 — Transfer of Shares.

Shares may be transferred from one person to another in accordance with the provisions of the Articles, and subject to any restrictions contained therein.

It is usual for the transferee to apply, but the transferor may do so. On the application of the transferor of any share or interest in a company, the company must enter in its register of members the name of the transferee in the same manner and subject to the same conditions as if the application for the entry were made by the transferee (§ 65). Either party may apply to the Court for rectification of the register (§ 100).

A transfer of the share or other interest of a deceased member of a company made by his personal representative, although the personal representative is not himself a member of the company, is as valid as if he had been such a member at the time of the execution of the instrument of transfer (§ 64).

Most companies refuse to recognise a signature on a transfer executed out of Great Britain unless attested by H.M. Consul or Vice-Consul, a clergyman, magistrate, notary public, or some other person holding a public position. If the transfer is executed by a person acting in a representative capacity, his authority to act should be seen, *e.g.*, an executor should produce probate; an administrator, probate or letters of administration; a trustee in bankruptcy, a copy of the *Gazette* or office copy of appointment; a liquidator, a copy of the *Gazette*; the committee of a lunatic, an office copy of order of Court; an attorney, the power of attorney (the company should see that this is still in force), etc.

A statutory declaration by an attorney that he has not received any notice or information of any revocation of his power by death or otherwise, if made immediately before or within three months after acting on the power, is conclusive proof of non-revocation (Law of Property Act, 1925, § 124 (2)).

Notwithstanding anything in its Articles, the company is bound to accept, as evidence of the transmission of the shares upon death, the production of any document which is by law sufficient evidence of probate of the will or letters of administration of the estate (§ 69).

The Articles sometimes provide that no transfer shall be permitted while there are calls in arrear, and

power is often given to the directors to refuse to register a transfer without assigning reasons. The Court will not override a *bond fide* refusal under such powers, nor will it require the directors to give reasons (*ex parte Penney* (1873), 8 Ch. 446) even if they are only empowered to refuse on particular grounds (*Coalport China Co.* (1895), 2 Ch. 404). In a private company the right to transfer must be restricted by the Articles (§ 26).

Where the Articles do not empower the directors to refuse registration of a transfer, they are bound to pass any transfer lodged with the company so long as it is in due form ; save that they are always entitled to refuse registration of a transfer to an infant of shares not fully paid (*Castello's Case* (1869), 8 Eq., 504).

In refusing to register a transfer in accordance with the right given them in the Articles, the directors must pass a resolution to that effect, i.e., the power must be actively exercised if it is to be effective. The absence of a resolution, owing to the only two directors of the company not being in agreement, is insufficient and the transferee could compel registration (*In re Hackney Pavilion, Ltd* (1924), 1 Ch. 276).

It is not uncommon to find, particularly in the case of private companies, that power is taken in the Articles for existing shareholders to acquire the shares of deceased or bankrupt members, or in other cases where members contemplate disposal of their shares. The exercise of such power in the interests of the company is valid. (*See* § 3 of this Chapter, *ante*.)

A letter signed by a shareholder renouncing his right to bonus shares in favour of a nominee is not a "transfer of shares," and a clause in the Articles

giving to the board a discretionary power to refuse to register transfers would not apply (*Pool Shipping Co.* (1920), 1 Ch. 251).

The transfer must be in writing and duly stamped ; any person registering a transfer, which on the face of it is not properly stamped, is liable to a penalty of £10 (Stamp Act, 1891, § 17). It is illegal for a company to register a transfer of shares or debentures unless a proper instrument of transfer has been delivered to the company except in the case of a transmission by operation of law (§ 63).

The form of transfer may be indicated by the Articles, or it may be in the common form obtainable at any law stationers ; it must be executed by the transferor, and the Articles generally provide that it shall be signed by both transferor and transferee. If the transfer is to be IN WRITING only, a blank transfer may be given, signed by the transferor, the name of the transferee being left to be filled in subsequently. Such a transfer can be validly completed in accordance with the agreement under which it was given.

If the Articles require the transfer to be BY DEED, it must be actually signed, sealed and delivered. In this case, since a deed must be complete when delivered, a blank transfer cannot be used unless accompanied by a power of attorney authorising the transferee to fill in the blank, i.e., the name of the transferee (*Hibblewhite v. McMorine* (1840), 6 M. & W. 200 ; *Powell v. London & Provincial Bank* (1893), 2 Ch. 555). A good EQUITABLE title could, however, be obtained with a blank transfer in such a case (*Société Générale v. Walker* (1885), 11 A.C. 20), and the transferor could be compelled to execute a valid transfer.

The idea of a blank transfer is that the share certificate, together with the blank transfer, can be deposited with the lender of money as security, the person taking the blank transfer having an express or implied authority to fill in his own name or that of some other person when the proper time comes, according to the contract entered into (*ex parte Sargent*, (1874), 17 Eq. 273), the transferor expressly or by implication undertaking to do nothing to prevent completion of title of the person whose name is so inserted (*Hooper v. Herts* (1906), 1 Ch. 549).

Where the holder of shares gives a blank transfer, and then subsequently, for the purpose of defrauding the holder of the blank transfer, obtains a duplicate certificate from the company and executes another transfer which is duly registered, the holder of the blank transfer will be defeated (*Peat v. Clayton* (1906), 1 Ch. 659). The transferee who is first to secure registration has priority, and such priority can be claimed even if the transferee's name has not been placed on the register, provided notice has been given to the company, and the transfer lodged before that of another transferee (*Moore v. North Western Bank* (1891), 2 Ch. 599). A person receiving a blank transfer should, therefore, protect himself by serving on the company a notice in lieu of *distringas*. (See § 10 *post*.)

In *Ireland v. Hart* ((1902), 1 Ch. 522), I. held certain shares in trust for his wife, but later deposited a blank transfer and the certificate with H. as security for his own debt. H. duly lodged the completed transfer with the company concerned, for registration, but I. had told the company not to register the transfer, and the company accordingly refused to do so. It was held that the wife had the

prior equity, and that the company was not bound to register the transfer to H., if it was aware of some good reason for not doing so.

The transferee does not get a full legal title till registration ; till that event the transferor remains liable for calls, but there is an implied contract that the transferee will indemnify him for all calls made after the contract for the sale of the shares ; and this right also exists where such transferee in turn sells his shares to another.

B. had agreed to sell to C. certain shares not fully called up, and obtained from A., the registered owner thereof, a transfer of the shares in blank, which he delivered to C. The latter sold the shares to D., who subsequently became bankrupt without having completed registration. A call was made on A., who claimed indemnity therefor from B., and he in turn brought an action against C. claiming successfully (1) specific performance of the contract, and (2) a declaration that C. was liable to indemnify him against all calls on the shares and other sums of money for which B. might be liable in respect of the shares by reason of C. having omitted to register the transfer (*Spencer v. Ashworth, Partington & Co.* (1925), 1 K.B. 589).

It is usual for the Articles to empower the company to refuse to register a transfer until the calls due have been paid.

Where a transfer has been lodged with the company, there must be no undue delay on the part of its officers in giving effect thereto, and should the company go

into liquidation when, by reason of such delay the name of the transferee is not entered on the register, the Court will on an application for rectification under § 100, direct that registration be completed so as, where the circumstances require it, to be retrospective in effect and to render valid notices, and so on, given by the transferee to the company (*Sussex Brick Co.* (1904), 1 Ch. 598).

Where a transferor holds a certificate for a number of shares and wishes to transfer a portion of the shares, or to transfer to more than one purchaser, the transfer is lodged with the certificate or other document of title (*e.g.*, allotment letters if the transfer is one in respect of shares for which a certificate has not yet been issued) at the company's office, and the secretary or other proper officer certifies upon the transfer that the certificate has been lodged. The document of title is retained by the company. This CERTIFICATION does not in any way warrant the title of the transferor or the validity of the documents lodged; it is simply a statement that certain documents have been lodged with the company showing *prima facie* that the transferor is entitled to the shares, but, even if no certificate has been lodged the company, on the authority of *Peek v. Derry* ((1889), 14 A.C. 337), is not liable for mere careless misrepresentation (*Bishop v. Balkis Land Co.* (1890), 25 Q.B.D. 512). And where the secretary has fraudulently certified that a certificate has been lodged, when in fact this has not been done, the company is not estopped from setting up the true facts and is, moreover, not liable for the wrongful certification by its secretary (*Whitechurch (George) Ltd. v. Cavanagh* (1902), A.C. 117); *Kleinwort v. Associated Automatic Machine Corporation* (1934), 50 T.L.R. 244).

The Stock Exchanges will also certify transfers of quoted, and in certain cases unquoted, stocks and shares, passing on to the company the documents of title with particulars of the transfers. The company should notify the transferor of the lodgment of a transfer for certification, in order to guard against unlawful transfers, although this notice does not estop the owner of the shares from denying the validity of the transfer, even if he does not reply to the notice (*Barton v. London & North Western Railway Co.* (1889), 24 Q.B.D. 77).

If by negligence the secretary, after certifying the transfer, returns the original certificate to the transferor, thereby enabling him fraudulently to pledge the same shares, the company is under no liability, as it owes no duty to the pledgee, and the immediate cause of his loss was not the issue of the certificate (*Longman v. Bath Electric Tramways* (1905), 1 Ch. 646).

Where a certificate is issued on a forged transfer, and on the strength of this certificate the shares are transferred to a *bonâ fide* purchaser for value, the transferee obtains no right to be placed on the register, but he is entitled to damages from the company because he has acted on the strength of a certificate issued by the company stating that the transferor was owner of the shares (*Balkis Consolidated Co. v. Tomkinson* (1893), App. Cas. 396).

The Forged Transfers Acts, 1891-92, allow a company, in view of this liability, to form a fund out of which to compensate those who have suffered damage through forged transfers. The company may charge a sum not exceeding 1/- per cent. on amounts transferred, but is not bound to give compensation

even out of this fund. Where the company makes compensation out of this fund, it is subrogated to the rights of the person compensated. Few companies adopt the powers; the most practical method of providing for such contingencies is by insurance.

Where the true owner has been removed from the register on a forged transfer, the company can be compelled to replace him and restore him the shares which have been transferred out of his name; and also to pay him any dividends which have been declared during the time his name did not appear upon the register (*Barton v. North Staffordshire Railway Co.* (1888), 38 Ch. D. 458; *Barton v. London & North Western Railway Co.* (1890), 24 Q.B.D. 77).

There is an implied contract on the part of the person lodging the transfer, that he will indemnify the company against loss by forgery, and a broker lodging a forged transfer is equally liable for any loss occasioned thereby (*Sheffield Corporation v. Barclay* (1905), A. C. 392). A broker, representing that he has authority to act for a transferor when such is not the case, is liable, even if acting *bonâ fide*, for breach of warranty of authority (*Starkey v. Bank of England* (1903), A. C. 114), and liability also attaches to a person who induces a company to register a forged transfer by identifying an impersonator as owner of the shares (*Bank of England v. Cutler* (1907), 1 K.B. 889).

Since the transfer procedure may extend over some days, the rights of the transferor and transferee are determined as at the date of sale of the shares: *e.g.*, if dividends are declared after the date of sale but before the completion of the transfer, they will in

equity belong to the buyer in the absence of any agreement to the contrary (*Black v. Homersham* (1878), 4 Ex. D. 24), although so far as the company is concerned it must pay the dividend to the registered holder.

§ 12.—Mortgage of Shares.

Shares may be mortgaged by making an actual transfer to the mortgagee (in which case upon registration he becomes a member of the company and liable to calls); or by deposit of the share certificate with the mortgagee accompanied by a blank transfer. The mortgagee is entitled to sell if the principal money becomes due, if this is stated in the contract entered into, or otherwise after giving reasonable notice to the mortgagor requiring payment (*Deverges v. Sandeman Clark & Co.* (1902), 1 Ch. 579).

Where a blank transfer is taken the mortgagee can protect himself by giving to the company a NOTICE IN LIEU OF DISTRINGAS. In order to do this the mortgagee must make an affidavit stating that he is interested in the stock or shares described in the notice exhibited with the affidavit. The affidavit and notice are filed in the offices of the Supreme Court, and an office copy of the affidavit and a duplicate of the notice, authenticated by the seal of the Central Office, is then served upon the company. The company served with the notice cannot then transfer the stock or shares, or (if the notice so requires) pay dividends in respect thereof, without giving eight days' notice to the mortgagee or other person filing the affidavit, within which time an injunction can be applied for to restrain the transfer or payment (Rules of the Supreme Court, Order XLVI).

§ 13.—Alteration of Capital.

In the case of a company limited by shares, it is essential that there should appear in the Memorandum a clause stating the amount of the nominal capital, the shares into which it is divided, and the amount of each share. The amount of the capital and the division into shares is initially a matter for the promoters and the subscribers to the Memorandum ; but when once fixed it is an essential part of the company's constitution, and can only be altered as provided by the Act.

A company limited by shares or a company limited by guarantee and having a share capital, if so authorised by its Articles, may alter the conditions of its Memorandum in the following manner :—

- (a) increase its share capital by new shares of such amount as it thinks expedient ;
- (b) consolidate and divide all or any of its share capital into shares of larger amount than its existing shares ;
- (c) convert all or any of its paid-up shares into stock, and reconvert that stock into paid up shares of any denomination ;
- (d) subdivide its shares, or any of them, into shares of smaller amount than is fixed by the Memorandum, so, however, that in the subdivision the proportion between the amount paid and the amount, if any, unpaid on each reduced share is the same as it was in the case of the share from which the reduced share is derived ;
- (e) cancel shares which, at the date of the passing of the resolution in that behalf, have not been taken or agreed to be taken by any person,

and diminish the amount of its share capital by the amount of the shares so cancelled; such a cancellation of shares is not deemed to be a reduction of share capital within the meaning of the Act.

These powers can only be exercised by the company in general meeting (§ 50).

If the Articles do not contain the necessary power, they must first be altered by special resolution to give that power. This resolution can be passed at the same meeting as the resolution for the alteration of capital.

The resolution required is an ordinary one, unless the Articles specify a special or an extraordinary resolution.

In addition to the above, the capital of a company may be reduced, or a reserve liability can be created. (See §§ 15 and 20 of this Chapter.)

In the case of an unlimited company, the Articles (and not the Memorandum) must state the share capital, if any, and that capital may be altered in the same manner as the Articles, *i.e.*, by special resolution.

§ 14.—Increase of Capital.

The share capital can be increased by a resolution of the company in general meeting, provided the Articles contain the requisite authority. If there be not already any power in the Articles, a special resolution will be necessary to provide therefor.

The notice of the meeting must state the amount by which it is proposed to increase the capital (*McConnell v. Prill* (1916), 2 Ch. 57).

Notice of the increase, and a printed copy of the resolution authorising it, must be forwarded to the

registrar of companies within 15 days after the passing of the resolution, under a penalty not exceeding £5 a day on the company itself, and every director and manager. The notice must include particulars as to the classes of shares affected and the conditions subject to which the new shares have been or are to be issued. The additional stamp duties must also be paid (§ 52).

Every copy of the Memorandum issued subsequent to the increase must show the alteration (§ 24).

Where the capital of the company is increased, but the whole amount of the increase is not issued, the further capital duty will be payable in respect of the full increase (*Attorney-General v. Anglo-Argentine Tramways Co.* (1909), 1 K.B. 677).

The resolution may provide for an increase of the same class of shares as those already issued, or for the creation of another class, *e.g.*, preference, deferred, etc. Where the rights of the shareholders are defined in the Memorandum, power to issue shares of a kind other than those originally issued should also be contained in the Memorandum, since the rights of existing shareholders would doubtless be affected, and if no such power existed, it would be necessary to proceed under § 153 of the Act.

§ 15.—Reduction of Capital.

Subject to confirmation by the Court, a company limited by shares or a company limited by guarantee and having a share capital may, if so authorised by its Articles, by special resolution reduce its share capital in any way, and in particular may—

- (a) extinguish or reduce the liability on any of its shares in respect of share capital not paid up ; or

- (b) either with or without extinguishing or reducing liability on any of its shares, cancel any paid-up share capital which is lost or unrepresented by available assets; or
- (c) either with or without extinguishing or reducing liability on any of its shares, pay off any paid-up share capital which is in excess of the wants of the company,

and may, if and so far as is necessary, alter its Memorandum by reducing the amount of its share capital and of its shares accordingly. Such a special resolution is referred to as "a resolution for reducing share capital" (§ 55).

Where a company has passed a resolution for reducing share capital, it may apply by petition to the Court for an order confirming the reduction (§ 56 (1)).

Where the proposed reduction of share capital involves either diminution of liability in respect of unpaid share capital or the payment to any shareholder of any paid-up share capital, and in any other case if the Court so directs, the following provisions have effect :—

- (a) Every creditor of the company who at the date fixed by the Court is entitled to any debt or claim which, if that date were the commencement of the winding-up of the company, would be admissible in proof against the company, is entitled to object to the reduction.
- (b) The Court must settle a list of creditors so entitled to object, and for that purpose must ascertain, as far as possible without requiring an application from any creditor,

the names of those creditors and the nature and amount of their debts or claims, and may publish notices fixing a day or days within which creditors not entered on the list are to claim to be so entered or are to be excluded from the right of objecting to the reduction.

(c) Where a creditor entered on the list whose debt or claim is not discharged or has not determined does not consent to the reduction, the Court may, if it thinks fit, dispense with the consent of that creditor, on the company securing payment of his debt or claim by appropriating, as the Court may direct, the following amount:—

- (i) If the company admits the full amount of the debt or claim, or, though not admitting it, is willing to provide for it, then the full amount of the debt or claim.
- (ii) If the company does not admit and is not willing to provide for the full amount of the debt or claim, or if the amount is contingent or not ascertained, then an amount fixed by the Court after the like inquiry and adjudication as if the company were being wound up by the Court (§ 56 (2)).

Where a proposed reduction of share capital involves either the diminution of any liability in respect of unpaid share capital or the payment to any shareholder of any paid-up share capital, the Court may, if having regard to any special circumstances of the case it thinks proper so to do, direct the provisions contained in § 56 (2) (*supra*) shall not apply as regards any class or any classes of creditors (§ 56 (3)).

The Court, if satisfied, with respect to every creditor of the company entitled to object to the reduction, that either his consent to the reduction has been obtained or his debt or claim has been discharged or has determined, or has been secured, may make an order confirming the reduction on such terms and conditions as it thinks fit.

Where the Court makes any such order, it may—

- (a) if for any special reason it thinks proper so to do, make an order directing that the company shall, during such period, commencing on or at any time after the date of the order, as is specified in the order, add to its name as the last words thereof the words “and reduced”; and
- (b) make an order requiring the company to publish as the Court directs the reasons for reduction or such other information in regard thereto as the Court may think expedient, with a view to giving proper information to the public, and, if the Court thinks fit, the causes which led to the reduction.

Where a company is ordered to add to its name the words “and reduced,” those words are, until the expiration of the period specified in the order, deemed to be part of the name of the company (§ 57).

The registrar of companies registers the order and minute on production to him of an order of the Court confirming the reduction of the share capital of a company, and the delivery to him of a copy of the order and of a minute approved by the Court, showing with respect to the share capital of the company, as altered by the order, the amount of the share capital, the number of shares into which it is to be divided,

and the amount of each share, and the amount, if any, at the date of the registration deemed to be paid up on each share. On such registration, and not before, the resolution for reducing share capital as confirmed by the order so registered takes effect.

Notice of the registration must be published in such manner as the Court may direct.

The registrar certifies under his hand the registration of the order and minute, and his certificate is conclusive evidence that all the requirements of the Act with respect to reduction of share capital have been complied with, and that the share capital of the company is such as is stated in the minute.

The minute when registered is deemed to be substituted for the corresponding part of the Memorandum, and is valid and alterable as if it had been originally contained therein (§ 58).

The substitution of any such minute for part of the Memorandum of the company is deemed to be an alteration of the Memorandum, and every copy of the Memorandum issued after the date of the alteration must be in accordance with the alteration (§§ 58 (6) and 24).

After the reduction, a member of the company, past or present, is not liable in respect of any share to any call or contribution exceeding in amount the difference, if any, between the amount of the share as fixed by the minute and the amount paid, or the reduced amount, if any, which is to be deemed to have been paid, on the share, as the case may be.

If, however, any creditor, entitled in respect of any debt or claim to object to the reduction of share capital, is, by reason of his ignorance of the proceedings for reduction, or of their nature and effect with respect

to his claim, not entered on the list of creditors, and, after the reduction, the company is unable to pay the amount of his debt or claim, then—

- (a) every person who was a member of the company at the date of the registration of the order for reduction and minute, is liable to contribute for the payment of that debt or claim, an amount not exceeding the amount which he would have been liable to contribute if the company had commenced to be wound up on the day before the said date ; and
- (b) if the company is wound up, the Court, on the application of any such creditor and proof of his ignorance as aforesaid, may, if it thinks fit, settle accordingly a list of persons so liable to contribute, and make and enforce calls and orders on the contributories settled on the list, as if they were ordinary contributories in a winding-up (§ 59).

Nothing in the above affects the rights of the contributories among themselves (§ 59 (2)).

If any director, manager, secretary or other officer of the company—

- (1) wilfully conceals the name of any creditor entitled to object to the reduction ; or
- (2) wilfully misrepresents the nature or amount of the debt or claim of any creditor ; or
- (3) aids, abets or is privy to any such concealment or misrepresentation,

he is guilty of a misdemeanour (§ 60).

If the power to reduce is not contained in the ARTICLES, these must be altered by special resolution, and a further special resolution must be passed

for reduction. The resolution taking the power must be passed before the resolution to reduce is dealt with by the meeting (*Oregon Mortgage Co.* (1910), S.C. 964, Court of Session). A mere power in the MEMORANDUM to reduce capital is not sufficient authority; the requirements of the Act must in any case be satisfied (*Dexine Patent Co.* (1903), 88 L.T., 791).

Sanction of the Court is necessary. If the reduction does not involve a repayment of capital, or reduce the liability of the shareholders as to uncalled capital, on the presentation of the petition a summons in chambers is taken out, directions are given fixing a day for hearing the petition and ordering advertisements; and in about a fortnight the order can be made.

If, however, the reduction involves a repayment of capital, or a reduction of liability as to uncalled capital, an enquiry has to be made as to debts and liabilities; the consent of creditors has to be obtained; those who do not consent must be paid off or provision made for paying their debts into Court; and it may be six or eight months before an order can be made, and the order when made must be advertised. In special circumstances, the Court may dispense with the consent of the creditors.

In both cases the Court may direct that the words "and reduced" be added to the company's name for such period commencing on or at any time after the date of the order as the Court directs. This order is only made for special reasons.

Although the Act mentions the specific cases in which a reduction can be obtained, a company may nevertheless reduce its capital to such an extent and in such a manner as it thinks fit (*British and*

American Trustee Corporation v. Couper (1894), App. Cas. 399). At one time sanction would not be given to a reduction unless it were shown that the capital was either lost or not represented by available assets, and the Court would not authorise such a reduction while there were any sums standing to the credit of reserve (*Barrow Haematite Co.* (1900), 2 Ch. 846); but this was overruled in *Hoare & Co., Ltd.* ((1904), 2 Ch. 208), in which case a loss was apportioned between capital and reserve.

It is most essential to prove that the capital is lost or unrepresented by available assets, or that it is in excess of the company's requirements; the matters to which the Court gives consideration are the interests of the members of the public who may be induced to take up shares, and the fairness of the reduction between the different classes of shareholders (*Poole v. National Bank of China* (1907), A.C. 229; *Lousiana Real Estate Co.* (1909), 2 Ch. 552).

When there is any reduction of liability on the shares or where there is any return of capital moneys in excess of the company's requirements, the creditors are entitled to object (unless the Court, in special circumstances, otherwise decides) since the capital fund is thereby reduced. Such creditors who do not consent to the reduction are entitled to have the debt due to them paid or secured to the satisfaction of the Court. Under other circumstances, creditors can only object if a strong case is made out (*Re Meux Brewery Co.* (1919), 1 Ch. 28).

In the case of reduction owing to loss of capital, the incidence of the loss should fall upon that class of shareholders who, according to the regulations of the company, should bear it (*Floating Dock Co.*

of *St. Thomas* (1895), 1 Ch. 691), and if the preference shares have preference as to capital, the loss should, in the absence of an agreement to the contrary with the preference shareholders, fall entirely on the ordinary shareholders (*Floating Dock Co. of St. Thomas, supra*; *Agricultural Hotel Co.* (1891), 1 Ch. 396).

If the preference shares have no preference as to capital, sanction will not be given to a return which reduces the ordinary shares, without reducing the preference shares, unless the ordinary shareholders fully understand and consent to the scheme (*Union Plate Glass Co.* (1889), 42 Ch. D. 516).

Although, as has been seen, where a reduction is for the purpose of extinguishing a loss of capital, the incidence of the loss will generally fall on those shareholders who would have to bear it in the event of winding-up (*London and New York Investment Corporation* (1895), 2 Ch. 860), it does not necessarily follow that the provisions of the Articles as to the bearing of losses in the event of winding up will be applied in the case of reduction. A fair scheme will be sanctioned by the Court even though the rights of the shareholders *inter se* may be altered (*Credit Assurance Co* (1902), 2 Ch. 601), and, in practice, all classes frequently share in the amounts written off.

The effect of the reduction is to reduce the nominal capital of the company as well as the issued capital. If subsequently the company passes a resolution to increase its nominal capital to the original amount, capital stamp duty is payable as if the reduced capital were the only amount on which duty had up to that time been paid. In order to retain the benefit of the stamp duty originally paid, therefore, it is advisable to increase the nominal capital to the original

amount at the same time as the resolution for reduction is passed, in which case no additional capital duty is exacted.

§ 16.—Consolidation and Conversion of Shares.

A company limited by shares may consolidate and divide all or any of its share capital into shares of larger amount than its existing shares, or it may convert all or any of its paid-up shares into stock and re-convert stock into shares of any denomination.

The conversion of shares into stock consists in the *fusion* of shares so that, *e.g.*, 100 shares of £1 each are transformed into £100 worth of stock.

To do any of these things the company must be authorised thereto by its Articles, and must exercise the power by a resolution passed by the company in general meeting. Every copy of the Memorandum issued after the date of any such alteration must show the alteration (§ 50).

Notice must be given to the registrar of companies within one month, specifying, as the case may be, the shares consolidated, divided or converted, or the stock re-converted, under a penalty on the company and every officer of the company who is in default, of a fine not exceeding £5 a day (§ 51).

Upon conversion, an entry must be made in the register of members showing the amount of stock held by each member, instead of the amount of shares and particulars relating to shares previously held (§ 95), and similar information must appear in the annual return (§ 108).

A company limited by shares cannot issue stock *ab initio*; it must first issue shares and these can be converted into stock after they are fully paid.

Where an original issue of stock was made, some portion being fully paid and some partly paid, the fully paid portion was subsequently held to be valid, but the partly paid portion was held to have been invalidly issued (*Home and Foreign Investment & Agency Co.* (1912), 1 Ch. 72). Strictly, both issues were invalid, but a very considerable time had elapsed since the issue of the stock and the liquidation of the company, in the course of which the action was brought, and the Court held that the irregularity with regard to the fully paid-up issue had been waived by lapse of time, but that the issue of stock only partly paid up was *ultra vires*.

The principal advantage derived from the issue of stock is that the holders may, subject to the Articles, transfer any fractional amounts and are not compelled to transfer complete units as in the case of shares. In addition, whereas every share must be distinguished by its appropriate number, stock cannot be so designated. It has been argued that the statutory requirement as to the numbering of shares should be withdrawn, in view of the contention that it is no protection to the holder and of the large amount of clerical work involved in dealing with transfers and registration, more especially in recent years when companies with large capitals divided into shares of low nominal amount are so common; but there has been a strong adverse opinion against the suggestion. Nevertheless, it is noteworthy that many large public companies have converted their capital into stock, and found it economical, in view of the work saved on recording transfers. When a transfer of stock is registered, only the amount of stock has to be entered in the holder's name, whereas in the case of shares, the distinctive numbers must be recorded both in the register of members and on the new share certificate(s).

§ 17.—Subdivision of Shares.

A company limited by shares may subdivide its shares into shares of smaller amount if so authorised by its Articles, and a resolution is passed by the company in general meeting (§ 50).

If the Articles do not originally give power to subdivide, a special resolution will be necessary to create such power.

Notice of the subdivision must be given to the registrar of companies within one month (§ 51).

Where the re-organisation provides for a consolidation of shares, and then a subdivision resulting from such consolidation, the scheme may be effected by one resolution (*In re North Cheshire Brewery Co.* (1920), 64 S.J. 463).

On the shares of smaller amount after subdivision, the amount unpaid must be proportionate to that on the shares from which the subdivision was made; e.g., if shares of £10 each, £5 paid, are each divided into ten shares of £1 each, the new shares must be each ten shillings paid.

Upon a re-organisation of capital, however, a company may divide each of its £1 shares, 15/- paid, into two different shares of 10/-, called respectively the A preference shares and the B preference shares, and may treat the A shares as fully paid and the B shares as 5/- paid and 5/- uncalled (*Vine and General Rubber Trust* (1913), 108 L.T. 709); and the Court may sanction a subdivision of partly paid shares by which the proportion of liability is reduced, acting under § 55 (1) (a) (by which a company may reduce the liability on its shares in respect of capital not paid up (see § 15 of this chapter)) (*Doloswella Rubber Estates* (1917), 1 Ch. 213).

Where a scheme of re-organisation or subdivision of capital involves an alteration of the rights of any class of shareholders, and the Memorandum does not contain any provision therefor, proceedings must be taken under § 153 of the Act.

The Court may approve a scheme under § 153 whereby benefits are conferred on one group of the subdivided shares, additional to those provided for in the Memorandum; for where the Memorandum laid down that no dividend exceeding 3 per cent. per annum should be paid on the ordinary shares (the only shares which had been issued) and such shares were subdivided into two ordinary and eight deferred shares, the former carrying a fixed non-cumulative dividend of 3 per cent., surplus profits to be applied in the payment of dividends on the deferred shares, the Court exercised its discretion, as the only persons interested in any profits in excess of the fixed dividend were the shareholders themselves, and confirmed the resolution passed for the re-organisation of the share capital notwithstanding the fact that the main purpose of the reorganisation was to escape the limitation as to dividends provided for by the Memorandum (*Garden Village (Hull), Ltd.* (1923), 1 Ch. 230).

§ 18.—Cancellation of Unissued Shares.

A company limited by shares may if sanctioned by its Articles (which may, of course, be altered by special resolution to give the power) cancel shares which, at the date of the passing of the resolution in that behalf, have not been taken or agreed to be taken by any person; and the amount of its share capital may be diminished by the amount of the shares so cancelled (§ 50).

It is expressly provided that this is not to be deemed a reduction of capital, and the cancellation can be effected by a resolution passed by the company in general meeting (§ 50). Notice of the cancellation must be given to the registrar of companies within one month (§ 51).

If it is desired to retain the benefit of the capital stamp duty already paid, a simultaneous increase of capital to the original amount is necessary (*cf.* § 15 of this Chapter). Cancellation may be resorted to where an unissued class of shares carries rights or obligations which the company wishes to get rid of, and it is therefore sometimes convenient to adopt this procedure.

§ 19 —Return of Capital out of Profits.

There is no power in the Companies Act, 1929, for a company to make a return of paid-up capital out of accumulated profits, except by the method of a reduction under § 55. The company can, of course, issue redeemable preference shares which may be redeemed by the utilisation of accumulated profits (§ 46).

§ 20.—Reserve Liability.

A limited company may by special resolution determine that any portion of its share capital which has not been already called up shall not be capable of being called up, except in the event and for the purposes of the company being wound up, and thereupon that portion of its share capital is not capable of being called up except in the event and for the purposes aforesaid (§ 49). Such uncalled capital is known as “RESERVE LIABILITY.” The creation of a reserve

liability has been common in banking companies, since it provides an additional fund to which the depositors may look in the event of failure.

This course can only be adopted after the company has been incorporated, *i.e.*, it is not possible to set up a reserve liability by original provision in the Articles ; but when once the requisite special resolution has been passed, the company cannot subsequently alter its Articles so as to make the reserve liability available at any time (*Malleson v. National Insurance Co.* (1894), 1 (Ch. 200).

A reserve liability of capital cannot be included in a charge on uncalled capital (*Bartlett v. Mayfair Property Co.* (1898), 2 (Ch. 28).

In considering whether a company is insolvent for the purpose of a winding-up order, unpaid capital may be considered as an asset, but reserve capital under § 49 cannot be taken into account (*Bristol Joint Stock Bank* (1890), 44 Ch. D. 703).

On becoming a limited company an unlimited company having a share capital may, by its resolution for registration as a limited company—

- (1) Increase the nominal amount of its share capital by increasing the nominal amount of each of its shares, but subject to the condition that no part of the increased capital shall be capable of being called up except in the event and for the purposes of the company being wound up ; and/or
- (2) Provide that a specified portion of its uncalled share capital shall not be capable of being called up except in the event and for the purposes of the company being wound up (§ 53).

§ 21.—Forfeiture of Shares.

A company may by its Articles be authorised to forfeit the shares of any member for the non-payment of calls, a forfeiture for any other reason constituting an illegal reduction of capital (*Hopkinson v. Mortimer Hurley & Co.* (1917), 1 Ch. 646. In order that a forfeiture be effectually enforced it is essential that the terms of the Articles as to forfeiture be strictly complied with (*Johnson v. Lyttle's Iron Agency* (1877), 5 Ch. D. 687).

Articles in this respect commonly follow Table A, which provides for the forfeiture of shares upon non-payment of calls. Notice must be served by the directors upon the person whose calls are unpaid, requiring payment of the amount due, together with any interest which may have accrued, and naming a further day (not less than 14 days from the date of the notice) on or before which the payment is to be made and stating that in the event of non-payment the shares will be liable to forfeiture. A resolution of the directors is necessary to enable the shares to be forfeited.

The shares may be sold or otherwise disposed of, or the forfeiture may be cancelled, as the directors think fit. The person whose shares have been forfeited ceases to be a member in respect of the shares, but is nevertheless liable to pay all moneys which at the date of forfeiture were actually due from him to the company in respect of the shares; but as soon as the company receives payment in full for the nominal amount of the shares,

this liability ceases. The shares may be forfeited for non-payment of premium as well as for non-payment of calls.

A statutory declaration in writing that the declarant is a director of the company, and that a share in the company has been duly forfeited on a date stated in the declaration, is conclusive evidence of the facts therein stated as against all persons claiming to be entitled to the share. The company may receive the consideration, if any, given for the share on any sale or disposition thereof and may execute a transfer of the share in favour of the person to whom the share is sold or disposed of, and he must thereupon be registered as the holder of the share, and is not bound to see to the application of the purchase money, if any, nor is his title to the share affected by any irregularity or invalidity in the proceedings in reference to the forfeiture, sale or disposal of the share (Table A, Arts. 23-29).

Once the shares have been forfeited, the former holder ceases to be a member of the company. Any amount for which he may be liable cannot be enforced as a call, but must be sued for as a debt. In the event of the liquidation of the company more than a year after forfeiture, his name cannot be placed on the list of contributories, but his liability is not terminated on the ground that the forfeiture had taken place more than a year previous to the winding-up (*Ladies Dress Association v. Pullbrook* (1900), 2 Q.B. 376). The former holder is liable (if at all) as a debtor and not as a contributory.

Where Table A does not apply, then unless the Articles provide otherwise, the forfeiture frees the shareholder from liability for past calls (*Stocken's Case* (1868), 3 Ch. 412), though he will be liable as a past member if liquidation ensues within 12 months (*Creyke's Case* (1869), 5 Ch. App. 63). There is, of course, no liability for any future calls.

It has been said that forfeited shares may be re-issued at a discount, *i.e.*, credited with the amount called up (*Morrison v. Trustees and Executors Co.* (1898), 68, L.J. Ch. 11), but this is not strictly correct, since in such a case the holder is liable to have calls made upon him for the amounts not paid (*New Balkis Eesterling v. Randt Gold Mining Co.* (1904), A.C. 165); he is, however, entitled to be credited with any amounts afterwards recovered from the original owner (*Re Randt Gold Mining Co.* (1904), 2 Ch. 468). All payments of uncalled capital by the new allottee enure for the benefit of the original owner, and release him *pro tanto* in respect of the damages for which his breach of contract in failing to pay the calls rendered him liable. This is so notwithstanding any provision in the Articles that the original holder is to remain liable for all calls, etc., owing at the date of forfeiture (*Re Bolton, ex parte North British Artificial Silk* (1930), 2 Ch. 48).

If a shareholder has been induced by misrepresentation to take shares in a company, he may enforce his right of relief, notwithstanding that his shares have been forfeited for non-payment of calls (*Aaron's Reefs v. Twiss* (1896), App. Cas. 273); and if an action is pending for rescission the company may be restrained from forfeiting the shares until the action has been determined, provided the calls are

paid into Court (*Jones v. Pacaya Rubber Co.* (1911), 1 K.B. 455).

Forfeiture should be resorted to FOR THE BENEFIT OF THE COMPANY and not in the interests of the shareholder to relieve him from possible liability (*Esparto Trading Co.* (1879), 12 Ch. 191).

A forfeiture may be made even when the company is in voluntary liquidation; and though the liquidator cannot himself forfeit, he may call upon the directors to exercise their powers in this respect in accordance with the Articles (*Fairbairn Engineering Co.* (1893), 3 Ch. 450).

The Articles may give power to the directors to annul a forfeiture, but the name of the shareholder cannot be replaced on the register without his consent (*Exchange Trust, Ltd., Larkworthy's case* (1903), 1 Ch. 711).

§ 22.—Surrender of Shares.

Shares may be surrendered by the registered holder as a short cut to forfeiture where the right to forfeit has already arisen (*Trevor v. Whitworth*, 12 A.C. 409, 417, 418; *Bellerby v. Rowland & Marwood Steamship Co.* (1902), 2 Ch. 14); but otherwise a surrender cannot be accepted without sanction of the Court, as this would amount to a reduction of capital.

The surrender of partly paid shares in consideration of the discharge of the registered holder from his liability in respect of them, amounts to a purchase of its own shares by the company and is ineffectual (*Bellerby v. Rowland & Marwood Steamship Co.*, *supra*).

The surrender of fully-paid shares is not legal without the sanction of the Court, since it may render

possible a payment of a dividend which would otherwise be illegal (*Bellerby v. Rowland & Marwood Steamship Co.*, *supra* ; *Anglo-French Exploration Co.* (1902), 2 Ch. 845).

The surrender for cancellation of redeemable preference shares on their redemption under § 46 does not, of course, come under the prohibition. Nor is it unlawful to surrender fully paid shares in exchange for other shares of an equal nominal value (*Rowell v. John Rowell & Sons* (1912), 2 Ch. 609), since there is then no reduction of capital.

§ 23.—Lien.

The Articles may give the company power to exercise a lien over shares for debts other than calls, and such a lien may be retrospective and extended to fully paid shares (*Re Rowe* (1904), 2 K.B. 489).

The lien given by Table A attaches only to shares which are partly paid. It attaches to all shares in respect of amounts due upon such shares, and to any shares registered in the name of a single person in respect of moneys otherwise owing to the company. The lien (if any) extends to dividends payable on the shares.

If the Articles give a lien on shares held jointly, this can be exercised even though such shares are really trust property (*London & Brazilian Bank v. Brocklebank* (1882), 21 Ch. D. 301); but where the Articles are similar to those of Table A already referred to, it is wise to have trust shares registered in the names of at least two trustees.

Such a course would prevent the exercise of the lien in respect of debts due to the company by a trustee in his personal capacity.

The purchaser of shares in respect of which a lien already attaches is bound thereby, though he may require the company to resort in the first place to shares still in the hands of the vendor (*Gray v. Stone* (1893), W.N. 133).

A lien cannot be enforced by forfeiture of the shares subject to it, but it may be enforced by sale if the Articles so provide and the relevant regulations, e.g., as to notice are duly observed. The Articles should also empower the directors to authorise some person to transfer the shares so sold to the purchaser thereof, in order to comply with § 63, which forbids the registration of a transfer except on a written instrument. The purchaser may, upon completion of the sale, be registered as the holder of the shares (cf. the provisions of Table A).

Where a company threatens to exercise its lien on the shares of a member, by sale, to avoid which the debt due is paid by a third party, such party is subrogated to the company's rights, and the lien is transferred to him (*Everett v. Automatic Co.* (1892), 3 Ch. 506).

Should a shareholder mortgage his shares and afterwards incur a liability with the company, the mortgagee, provided he gave due notice to the company of his charge, will gain priority over the company's lien (even when stated in the Articles to be a paramount lien) arising in respect of the transactions subsequent to notice being given (*Bradford Banking Co. v. Briggs* (1886), 12 A.C. 29).

The Articles may be altered so as to include a right of lien even after the shares have been issued and even after the death of the shareholder (*Allen v. Gold Reefs of West Africa* (1900), 1 Ch. 656), but transfers

lodged previously thereto but not completed, will not be affected thereby (*McArthur v. Golf Line* (1909), S.C. 732).

A company must not enter, either in the register of members or on the share certificate, any note of any lien it may have (*W. Key & Son* (1902), 1 Ch. 467).

§ 24.—Issue of Shares at a Discount.

A company may issue at a discount shares in the company of a class already issued, provided that—

- (a) the issue of the shares at a discount must be authorised by resolution passed in general meeting of the company, and must be sanctioned by the Court ;
- (b) the resolution must specify the maximum rate of discount at which the shares are to be issued ;
- (c) not less than one year must at the date of the issue have elapsed since the date on which the company was entitled to commence business ;
- (d) the shares to be issued at a discount must be issued within one month after the date on which the issue is sanctioned by the Court or within such extended time as the Court may allow.

Where a company has passed a resolution authorising the issue of shares at a discount, it may apply to the Court for an order sanctioning the issue, and on any such application the Court if, having regard to all the circumstances of the case, it thinks proper so to do, may make an order sanctioning the issue on such terms and conditions as it thinks fit.

Every prospectus relating to the issue of the shares, and every balance sheet issued by the company subsequently to the issue of the shares, must contain particulars of the discount allowed on the issue of the shares or of so much of that discount as has not been written off at the date of the issue of the document in question, under a penalty on the company, and every officer of the company who is in default of a fine not exceeding £5 a day (§ 47).

It should be noted that it is possible to issue at a discount shares only of a class already issued. This is doubtless due to the fact that the existing shares may have a market value of less than par, and it would not therefore be practicable to make a further issue of a class of shares carrying the same rights at a figure substantially different from the existing market price. Where it is desired to issue shares of a different class, there would be no justification for issuing them at a discount, since the rights to be accorded in respect thereof could be determined in such a manner as to induce the public to subscribe for them at par.

Particulars of the discount allowed on the issue of any shares, or of so much of that discount as has not been written off to date must be disclosed in the annual return (§ 108).

Whilst, prior to the Companies Act, 1929, it was not legal to make a direct issue of shares at a discount, shares have frequently been and are still issued in circumstances which have achieved this end. It is permissible to issue shares for a consideration other than cash (*e.g.*, the acquisition of property or for services rendered, or by way of commission even to original allottees) and such consideration may not, in all cases, be adequate. But if the contract is fraudulent, or if it is apparent on the face of it that

the consideration is illusory or less in value than the nominal value of the shares, the allottee may be held liable to pay the difference (*Hong Kong & China Gas Co. v. Glen* (1914), 1 Ch. 527; Chap. VI, § 6). The Court, however, in the absence of fraud, will not set aside a contract merely on the ground of inadequacy of consideration (*Re Wragg Ltd.* (1897), 1 Ch. 796).

Where a company agreed to buy property from A. for a sum of money, and A. agreed to take a number of shares in the company for cash, actually paying cash for some of them, but allowing the company to retain part of the consideration for the sale of the property for the balance due on the shares, it was held that the whole of the shares had been paid for in cash (*Larocque v. Beauchemin* (1897), A.C. 358). Lord MacNaghten said: "If a transaction resulted in this, that there was on the one side a *bond fide* debt payable in money AT ONCE for the purchase of the property, and on the other side a *bond fide* liability to pay money AT ONCE on shares, so that, if banknotes had been handed from one side of the table to the other in payment of calls, they might legitimately have been handed back in payment for the property, it appears to me that the Act does not make it necessary that the formality should be gone through of the money being handed over and taken back again."

SYNOPSIS OF CHAPTER VIII.

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CHAPTER VIII.

MANAGEMENT, ADMINISTRATION
AND PROCEDURE.

§ 1.—The Registered Office.

Every company must, as from the day on which it begins to carry on business or as from the twenty-eighth day after the date of its incorporation, whichever is the earlier, have a registered office to which notices and communications may be addressed. The registered office may be changed from time to time so long as it remains within the domicile shown by the Memorandum; but notice of its original situation or of any change must be given to the Registrar of Companies within twenty-eight days after the date of the incorporation of the company or of the change, as the case may be.

The inclusion in the annual return of a company of a statement as to the address of its registered office does not satisfy the obligation to file such notice.

The penalty for default in any of the above respects is a fine not exceeding £5 a day on the company and every officer of the company who is in default (§ 92).

If there is no registered office, a creditor may serve a demand for payment at its unregistered office (*British and Foreign Gas Generating Apparatus Co.* (1865), 13 W.R. 649).

§ 2.—Publication of Name.

Every company must—

- (a) paint or affix, and keep painted or affixed, its name on the outside of every office or place in which its business is carried on, in a conspicuous position, in letters easily legible ;
- (b) have its name engraven in legible characters on its seal ;
- (c) have its name mentioned in legible characters in all notices, advertisements, and other official publications of the company, and in all bills of exchange, promissory notes, endorsements, cheques, and orders for money or goods purporting to be signed by or on behalf of the company, and in all bills of parcels, invoices, receipts, and letters of credit of the company.

The penalty for not painting or affixing the name is a fine not exceeding £5 ; that for failure to keep the name so painted or affixed is a fine not exceeding £5 a day, on the company and every officer of the company who is in default.

If a company fails to have its name engraven on its seal or mentioned in legible characters on documents, it is liable to a fine not exceeding £50.

If a director, manager, or officer of a company or any person on its behalf—

- (a) uses or authorises the use of any seal purporting to be a seal of the company whereon its name is not so engraven ; or
- (b) issues or authorises the issue of any notice, advertisement, or other official publication

of the company, or signs or authorises to be signed on behalf of the company any bill of exchange, promissory note, endorsement, cheque, or order for money or goods, wherein its name is not mentioned in manner aforesaid ; or

- (c) issues or authorises the issue of any bill of parcels, invoice, receipt, or letter of credit of the company, wherein its name is not mentioned in manner aforesaid, he is liable to a fine not exceeding fifty pounds, and is also personally liable to the holder of the bill of exchange, promissory note, cheque, or order for money or goods, for the amount thereof, unless it is duly paid by the company (§ 93).

The word "Limited" may be abbreviated to "Ltd." or "Ld." (*F. Stacey & Co. v. Wallis* (1912), 28 T.L.R. 209). The liability of directors and officers on bills of exchange, promissory notes, etc., issued without the company's name being mentioned, if they are not duly paid by the company, also attaches in the case of an acceptance on behalf of the company if the name of the company is not given correctly in every detail (*Atkins v. Wardle* (1889), 5 T.L.R. 734 ; *Nassau Steam Press v. Tyler* (1894), 70 L.T. 376).

§ 3.—Officers of the Company.

The officer of the company upon whom normally rests the responsibility for regularising the proceedings of the company is the secretary. He must see that the provisions of the Companies Act and of the Memorandum and Articles of the company are complied with ; that the books of the company, particularly

the statutory books, are properly written up ; that minutes of all proceedings whether at meetings of directors or of the members of the company are taken ; and it is also usual for him to authenticate, together with one or more of the directors, the use of the common seal.

He is generally responsible for the correspondence of the company, and is the mouthpiece and instrument of the company so far as any ministerial acts are concerned. He usually countersigns cheques for and on behalf of the company, and it is his duty to see that the transfer of shares is in order and that the register of members is properly kept, unless a registrar is appointed by the company.

The directors are not strictly officers of the company, but a managing director is an officer to the extent to which he is a manager.

In the Act, however, the expression " officer " is frequently employed in connection with penalties arising upon default in complying with statutory requirements, and such expression is deemed to include, for this purpose, a director, manager, or secretary. Section 365 provides in this connection that—

- (1) Where by any enactment in the Act it is provided that a company and every officer of the company who is in default shall be liable to a **DEFAULT FINE**, the company and every such officer shall, for every day during which the default, refusal or contravention continues, be liable to a fine not exceeding such amount as is specified in the said enactment, or, if the amount of the fine is not so specified, to a fine not exceeding £5.

- (2) For the purpose of any enactment in the Act which provides that an officer of a company who is in default shall be liable to a fine or penalty, the expression "officer who is in default" means any director, manager, secretary or other officer of the company, who knowingly and wilfully authorises or permits the default, refusal or contravention mentioned in the enactment.

If a director acts as secretary, he will of course be an officer of the company to that extent also. It is specially provided that no director or officer of the company can act as auditor (§ 133).

The principal decisions of the Courts concerning who are officers of the company have arisen in connection with misfeasance proceedings which are now governed by § 276 of the Act (*see* Chap. X, § 13). The secretary is an officer (*McKay's Case* (1875), 2 Ch. D. 1); and so is the solicitor of the company doing all the legal work of the company for a fixed salary (*Liberator Building Society* (1894), 71 L.T. 406). A solicitor acting in the ordinary way in a consultative capacity, however, is not an officer of the company (*Carter's Case* (1886), 31 Ch. D. 496); nor are the bankers of the company (*Imperial Land Co. of Marseilles* (1870), 10 Eq. 298).

Section 132 (3) of the Act refers to the office of auditor, and it would seem that the auditor is an officer of the company in so far as the performance of his duties as auditor is concerned.

In the case of the *London General Bank* (No. 1) ((1895), 2 Ch. 166) it was held that the auditor of a bank registered under the Companies Act, 1879, is an officer of the company. Similarly, in the case of the *Kingston Cotton Mill Co.* ((1896), 1 Ch. 6),

where the Articles of the company relating to the audit of the accounts were in substance the same as the Audit Clause of Table A to the Companies Act, 1862, but did not specifically refer to the auditors as officers of the company, it was held that the auditor was an officer.

An auditor who has never been properly appointed is not an officer of the company (*Western Counties Steam Bakeries and Milling Co., Ltd.* (1897), 1 Ch. 617).

§ 4.—Board Meetings.

The control by the directors of the administration, business and policy of the company is normally effected through decisions taken at what are called “board meetings.” These consist of meetings of the directors constituted in the manner required by the Articles at which the directors act collectively as a body. Where there is a managing director or directors, matters will frequently be left to be dealt with at his or their discretion, when they will be subsequently ratified at a meeting of the board, or authority may be delegated to a special committee of two or more directors. In matters of urgency the secretary of the company can also act in the same way, though this is not recommended if it can be avoided.

It is usual for the secretary to prepare an agenda to show the business at the board meetings, which are commonly held at fixed intervals of time, *e.g.*, every week or every month, and this agenda will form the basis of the proceedings at the meeting. From the notes made by the chairman or the secretary, the resolutions of the board can be subsequently entered into the minute book, which will be evidence of the proceedings at the meeting (§ 120).

Members of the company as well as outsiders are bound by the acts of the directors at their meetings, even though there may be a defect in the appointment of the directors (*Dawson v. African Consolidated Co.* (1898), 1 Ch. 6; *British Asbestos Co. v. Boyd* (1903), 2 Ch. 439); and the same rule applies in the case of companies governed by the Companies Clauses Consolidation Act, 1845 (*Channel Collieries Trust v. Dover, etc., Light Railways* (1914), 2 Ch. 506).

§ 5.—Meetings of the Company.

Although the ordinary business of the company is carried out by the officers and employees of the company under the instructions of the directors, the ultimate control of affairs is really reserved to the company in general meeting.

Meetings of the company are summoned by the secretary, who must see that the length of notice required by the Articles is given; in most cases, at least seven days' notice is required. An agenda is generally sent with the notice convening the meeting, and if any extraordinary or special resolution is to be proposed, the notice must specify the terms of such resolution; in the case of a special resolution 21 clear days' notice is required, unless all the members entitled to attend and vote at the meeting agree to waive the notice (§ 117).

Where the Articles prescribe a certain number of days notice, this means "clear days" (*Railway Sleepers Co.* (1885), 29 Ch. D. 204), and neither the day of issue nor day of meeting can be counted. Articles usually follow Table A, however, and provide that the day on which notice is served or deemed to be served shall be excluded and the day of the meeting included (see § 42 of Table A).

The notice convening a meeting must comply with the Act and the Articles, and substantially and fairly indicate the nature of the business to be transacted. They are not to be too rigidly construed, but must be explicit, unambiguous, and reasonably intelligible to recipients.

The conduct of the meeting is in the hands of the chairman, who usually submits the business to the meeting in the order of the agenda. He is responsible for the preservation of order, and for the observance of the rules of debate. The discussion of any particular matter may be put an end to by the chairman with the concurrence of the majority, after it has been reasonably debated (*Wall v. London and Northern Assets Corporation* (1898), 2 Ch. 469).

It is the duty of the chairman to put resolutions to the vote, and his declaration that a resolution is carried is conclusive (*Re Hadleigh Castle Gold Mines* (1900), 2 Ch. 419). The remedy of an aggrieved shareholder is to demand a poll. The ruling of the chairman can, however, be challenged if it is so obviously incorrect that the resolution itself would be bad.

At an ordinary general meeting, business may be ordinary or special. Ordinary business is defined by the Articles, e.g., in Table A, Article 44, under which is included "sanctioning a dividend, the consideration of the accounts, balance sheets, and the ordinary report of the directors and auditors, the election of directors and other officers in the place of those retiring by rotation, and the fixing of the remuneration of the auditors." All other business is special and its nature should be disclosed in the notice of the meeting.

Meetings may be adjourned in accordance with the provisions contained in the Articles, which commonly provide that no notice of the adjourned meeting need be given as it is regarded merely as a continuation of the previous meeting, but that if the adjournment is for 10 days or more from the date of the original meeting, notice thereof must be sent to all members entitled to attend (*cf.* Table A, Cl. 49). If a resolution is passed at the adjourned meeting, it must be treated as having been passed at that date and not as at the date of the earlier meeting notwithstanding the fact that the adjourned meeting is regarded as a continuance of the original meeting (§ 119).

(a) Minutes of Proceedings.

Every company must cause minutes of all proceedings of general meetings, and where there are directors or managers, of all proceedings at meetings of its directors or of its managers to be entered in books kept for that purpose.

Any such minute if purporting to be signed by the chairman of the meeting at which the proceedings were had, or by the chairman of the next succeeding meeting, is evidence of the proceedings.

Where minutes are so made of the proceedings of any general meeting of the company or meeting of directors or managers, then until the contrary is proved, the meeting is deemed to have been duly held and convened, and all proceedings had thereat to have been duly had, and all appointments of directors, managers, or liquidators to be valid (§ 120).

The minutes, even when signed, are only *prima facie* evidence; rebutting evidence may be produced (*Indian Zoedone Co.* (1884), 26 Ch. D. 70).

(b) The Statutory Meeting.

Except in the case of private companies, every company limited by shares, and every company limited by guarantee and having a share capital, must within a period of not less than one month nor more than three months from the date at which the company is entitled to commence business, hold a general meeting of the members of the company which is called "the statutory meeting."

The directors must, at least seven days before the day on which the meeting is held, forward a report (referred to as "the statutory report") to every member of the company.

The STATUTORY REPORT must be CERTIFIED by not less than TWO DIRECTORS of the company, or, where there are less than two directors, by the sole director and manager, and state—

- (a) the total number of SHARES ALLOTTED, distinguishing shares allotted as fully or partly paid up otherwise than in cash, and stating in the case of shares partly paid up the extent to which they are so paid up, and in either case the consideration for which they have been allotted ;
- (b) the total amount of CASH RECEIVED by the company in respect of all the shares allotted, distinguished as aforesaid ;
- (c) an abstract of the RECEIPTS of the company and of the PAYMENTS made thereout, up to a date within seven days of the date of the report, exhibiting under distinctive headings the receipts of the company from shares and debentures and other sources, the payments made thereout, and particulars concerning

the balance remaining in hand, and an account or estimate of the preliminary expenses of the company ;

- (d) the NAMES, ADDRESSES, and DESCRIPTIONS of the DIRECTORS, AUDITORS, if any, MANAGERS, if any, and SECRETARY of the company ; and
- (e) the PARTICULARS OF ANY CONTRACT, the MODIFICATION of which is to be submitted to the meeting for its approval together with the particulars of the modification or proposed modification.

The statutory report must so far as it relates to the shares allotted by the company, and to the cash received in respect of such shares, and to the receipts and payments of the company on capital account, be CERTIFIED as correct by THE AUDITORS, if any, of the company.

The directors must cause a copy of the statutory report, certified as required by this section, to be delivered to the Registrar of Companies for registration forthwith after sending it to the members of the company.

The directors must cause a list showing the names, descriptions, and addresses of the members of the company, and the number of shares held by them respectively, to be produced at the commencement of the meeting, and to remain open and accessible to any member of the company during the continuance of the meeting.

The members of the company present at the meeting are at liberty to discuss any matter relating to the formation of the company, or arising out of the statutory report, whether previous notice has been given or not, but no resolution of which notice has not been given in accordance with the Articles may be passed.

The meeting may adjourn from time to time, and at any adjourned meeting any resolution of which notice has been given in accordance with the Articles, either before or subsequently to the former meeting, may be passed, and the adjourned meeting has the same powers as an original meeting.

In the event of any default in complying with the above provisions every director of the company who is guilty of or who knowingly and wilfully authorises or permits the default is liable to a fine not exceeding fifty pounds (§ 113).

A public company cannot commence business until it has obtained a certificate from the Registrar entitling it to do so (§ 94).

The fact that it is the statutory meeting which is being convened must be stated in the notice (*Gardner v. Iredale* (1912), 1 Ch. 700).

If the statutory meeting is not held or the statutory report filed, a shareholder may present a petition for the winding-up of the company after the expiration of fourteen days from the last day on which the meeting ought to have been held (§§ 168 (2) and 170). Instead of making a winding-up order, however, the Court may direct the statutory report to be filed or the statutory meeting to be held (§ 170 (2)).

A contract referred to in the prospectus or statement in lieu of prospectus may not be varied prior to the statutory meeting, except subject to the approval of such meeting (§ 36).

(c) Annual Meeting.

Every company must hold a general meeting once at least in every calendar year, and not more

than fifteen months after the holding of the last preceding general meeting, under a penalty for failure of a fine not exceeding £50 on the company itself, and on every director or manager of the company who is knowingly a party to the default. The Court may, on the application of any member of the company, call, or direct the calling of, a general meeting of the company (§ 112).

(d) Extraordinary Meetings.

The directors can, in addition to the meetings already mentioned, summon such other meetings as may be necessary.

The statutory meeting of a company and the annual general meetings which are required by the Act to be held, are called "ordinary" meetings. The Articles will also empower the directors to convene general meetings of the company whenever necessary or expedient. Such meetings are termed "extraordinary," and are held as and when the directors in their discretion see fit to convene them.

In order that the members should be able, when circumstances make it requisite, to demand and procure the convention of an extraordinary meeting, Section 114 of the Act provides that, notwithstanding anything in the Articles, the directors must on the requisition of members of the company holding at the date of the deposit of the requisition not less than one-tenth of such of the paid-up capital of the company as at the date of the deposit carries the right of voting at general meetings of the company, or, in the case of a company not having a share capital, members of the company representing not less than one-tenth of the total voting rights of all the members having at the said date a right to vote at general meetings

of the company, forthwith proceed duly to convene an extraordinary general meeting of the company.

The requisition must state the objects of the meeting, and must be signed by the requisitionists and deposited at the registered office of the company, and may consist of several documents in like form each signed by one or more requisitionists (even though the terms of such documents are not identical (*Fruit and Vegetable Growers' Association v. Kekewich* (1912), 2 Ch. 52)).

If the directors do not within twenty-one days from the date of the deposit of the requisition proceed duly to convene a meeting, the requisitionists, or any of them representing more than one-half of the total voting rights of all of them, may themselves convene a meeting, but any meeting so convened must not be held after the expiration of three months from the said date.

A meeting so convened by the requisitionists must be convened in the same manner, as nearly as possible, as that in which meetings are to be convened by directors.

Any reasonable expenses incurred by the requisitionists by reason of the failure of the directors duly to convene a meeting must be repaid to the requisitionists by the company, and any sum so repaid must be retained by the company out of any sums due or becoming due from the company by way of fees or other remuneration in respect of their services to such of the directors as were in default.

In the case of a meeting at which a resolution is to be proposed as a special resolution the directors are deemed not to have duly convened the meeting if they do not give the notice required by § 117 (i.e., 21 days, see § 5 below.)

(e) Statutory Rights as to Meetings.

The rights as to notice and the proceedings in respect of meetings will be found in the Articles of the company, but the following provisions have effect in-so-far as the Articles of the company do not make other provision in that behalf :—

- (a) a meeting of a company, other than a meeting for the passing of a special resolution, may be called by seven days' notice in writing ;
- (b) notice of the meeting of a company must be served on every member of the company in the manner in which notices are required to be served by Table A, for the time being in force ;
- (c) two or more members holding not less than one-tenth of the issued capital or, if the company has not a share capital, not less than five per cent. in number of the members of the company, may call a meeting ;
- (d) in the case of a private company two members, and in the case of any other company three members, personally present constitute a quorum ;
- (e) any member elected by the members present at a meeting may be chairman thereof ;
- (f) in the case of a company originally having a share capital every member has one vote in respect of each share or each ten pounds of stock held by him, and in any other case every member has one vote.

If for any reason it is impracticable to call a meeting of a company in any manner in which meetings of that company may be called, or to conduct the meeting of the company in manner prescribed by the Articles

or the Act, the Court may, either of its own motion or on the application of any director of the company or of any member of the company who would be entitled to vote at the meeting, order a meeting of the company to be called, held and conducted in such manner as the Court thinks fit, and where any such order is made may give such ancillary or consequential directions as it thinks expedient, and any meeting called, held and conducted in accordance with any such order is for all purposes deemed to be a meeting of the company duly called, held and conducted (§ 115).

(f) Voting Powers.

The voting power of members is usually fixed by the Articles and will normally vary according to the extent of their respective interests in the company. Voting powers as thus determined are, however, operative only where a poll is taken; if there be no poll, but the voting is purely by show of hands, each member is entitled to one vote. In such a case a proxy cannot be effectively exercised by a member for he can cast only a single vote on behalf of himself and the persons whom he represents; but if the Articles allow a person other than a member to be a proxy, he can vote on a show of hands (*Ernest v. Loma Gold Mines* (1897), 1 Ch. 1).

If different voting powers are attached to different classes of shares, this must be shown in any prospectus (Fourth Schedule, Part I).

The right of a member to vote is established, *prima facie*, by the entry of his name in the register of members (§ 95, 102). Thus a bankrupt member is not deprived of his right so long as his name remains on the register even though such shares have been

disclaimed by his trustee (*Wise v. Lansdell* (1921), 1 Ch. 420). In this case, the shares were encumbered, and the Court decided that in the circumstances, the member could exercise his right to vote, but at the dictation of the mortgagee.

Where shares are held in the names of two or more persons, the capacity to vote is usually restricted to the joint holder whose name is placed first in the register of members. The joint holders in such a case are entitled, if they consider it advisable for protecting their interests, to call upon the company to insert the joint names in the reverse order in respect of part of the holding (*Burns v. Siemens Brothers Dynamo Works Ltd.* (No. 2) (1919), 1 Ch. 225).

The holders of preference shares are frequently not accorded a right to vote at meetings of the company, unless dividends are in arrear or proposals are made whereby the rights of such shareholders are affected. When dividends are non-cumulative and have not been paid for some years on account of the fact that no profits have been earned, such dividends are not deemed to be "in arrear" so as to entitle the preference shareholders to attend and vote at meetings of the company (*Coulson v. Austin Motor Co.* 43 T.L.R. 493).

The holder of a share warrant is not a member of the company and will, therefore, not be entitled to vote in respect of his holding unless the Articles provide that he shall enjoy the rights of a member. In such case the warrant holder will usually be required to deposit the warrant at the registered office of the company at a specified period before any meeting at which the holder desires to vote.

(g) Poll.

A show of hands is the common law mode of taking a vote, and if the numbers be equal, the chairman has no casting vote unless the regulations so provide. Under § 52 of Table A, a casting vote is given whether on a show of hands or on a poll.

Where the voting is by show of hands, a person who is present can only have one vote, and not one vote for himself and others for absent members for whom he is proxy.

There is a common law right to demand a poll, unless the regulations otherwise provide; but in the absence of provisions in the regulations, a proxy cannot demand a poll (*Reg. v. Government Stock Investment Corporation* (1878), 3 Q.B.D. 443). If, however, there is a provision in the Articles that a person other than a member may be appointed as a proxy, such a person may form one of a number to demand a poll (*Ernest v. Loma Gold Mines* (1897), 1 Ch. 1).

The taking of a poll is governed by the Articles subject, in the case of an extraordinary or a special resolution, to the provisions of § 117 (4) of the Companies Act. Under Table A three members present in person or by proxy and entitled to vote, or one member, or two members so present and entitled and holding not less than 15 per cent. of the paid-up share capital may demand a poll.

On an extraordinary or special resolution such number of persons not exceeding five, entitled to vote, as the Articles specify, may demand a poll; if no provision is made by the Articles, three members so entitled or one member or two members, so entitled, if that member holds, or those two members together hold not less than 15 per cent. of the paid-up share

capital of the company may make the demand (§ 117 (4)).

At a meeting held to pass a special resolution, if no poll is demanded at the meeting, the declaration of the chairman that the special resolution has been carried by the requisite majority is final and conclusive, even though it transpires that the resolution had been carried by the votes of unqualified shareholders (*Graham's Morocco Co.* (1932), S.C. 269).

The time and place for taking a poll is usually settled by the chairman, and it would seem that it is not necessary, unless specifically required by the Articles to adjourn the meeting for the purpose (*Chillington Iron Co.* (1885), 29 Ch. D. 159); but it is better to do so if the matter is important or the attendance of shareholders is not representative.

If the Articles provide, as is usual, that the votes are to be given personally or by proxy, the poll cannot be taken by voting papers (*McMillan v. Le Roi Mining Co.* (1906), 1 Ch. 331).

(h) Proxies.

There is no common law right to vote by proxy, and therefore the right must be expressly given by the Articles.

The form of proxy will usually be settled by the Articles, which will also provide to whom a proxy can be given.

It is for the chairman of the meeting to determine whether the proxies submitted are in order, and his decision is binding unless the Court makes any order to the contrary (*Indian Zoedone Co.* (1884), 26 Ch. D. 70). If the form of proxy is not in accordance with the company's Articles (e.g., an unwitnessed

instrument where attestation is provided for), it should be rejected (*Harben v. Phillips* (1883), 23 Ch. D. 14).

Since the holder of a proxy acts as the agent of the member giving it, his authority to vote can be withdrawn at any time before the meeting, and would automatically lapse upon the death of the principal.

A shareholder who has given a proxy can attend and vote at the meeting, in which case the vote given by the proxy should be rejected (*Cousins v. International Brick Co.* (1931), 2 Ch. 90). It would appear, however, that the over-riding right of the donor to attend and vote in person may be extinguished by appropriate provision in the Articles.

The directors may use the company's funds in stamping and sending out proxies containing the names of the directors, provided they are acting in the interests of the company (*Peel v. L. & N.W.R.* (1907), 1 Ch. 5).

A proxy to be used only at one meeting or its adjournment is called a special proxy and requires a penny stamp, which must be affixed before execution, and cancelled by the person signing, otherwise the proxy is invalid. Any proxy to be used at more than one meeting or its adjournment is a general proxy and requires a 10s. stamp (Stamp Act, 1891, § 80).

Where a company is a member of another company it cannot, of course, attend a meeting of a company of which it is a member in the same way as an ordinary person. It is therefore provided that it may—

- (a) If it is a member of a company within the meaning of the Act, by resolution of its directors or other governing body authorise

such person as it thinks fit to act as its representative at any meeting of the company or at any meeting of any class of members of the company ;

- (b) if it is a creditor (including a holder of debentures) of a company within the meaning of the Act, by resolution of its directors or other governing body, authorise such person as it thinks fit to act as its representative at any meeting of any creditors of the company held in pursuance of the Act or of any rules made thereunder, or in pursuance of the provisions contained in any debenture or trust deed, as the case may be.

A person so authorised is entitled to exercise the same powers on behalf of the corporation which he represents as that corporation could exercise if it were an individual shareholder, creditor, or holder of debentures, of that other company (§ 116).

(j) **Quorum.**

The Articles usually fix the number necessary to form a quorum ; if none be fixed, three (and in the case of a private company, two) members entitled to vote form a quorum (§ 115). A person representing a limited company shareholder is taken into account for this purpose (*Kelantan Coco Nut Estates* (1920), 64 S.J. 700).

(k) **Resolutions.**

The resolutions passed at meetings may be ordinary, extraordinary, special, or such as by the Act or the Articles require in relation to particular matters a specified majority.

An **ORDINARY** resolution is one passed by a simple numerical majority of such members as, being entitled so to do, vote in person or, where proxies are allowed, by proxy, at a meeting. Those who do not vote are not counted. All business at a meeting (even at an extraordinary meeting) is by ordinary resolution, unless the Act, Memorandum or Articles requires higher form.

An **EXTRAORDINARY** resolution is one passed by a majority of not less than three-fourths of such members as, being entitled so to do, vote in person or, where proxies are allowed, by proxy, at a general meeting at which notice specifying the intention to propose the resolution as an extraordinary resolution has been duly given. (The "three-fourths" majority means that at least three-fourths of those who vote must vote in favour of the resolution, not that the difference between the two sets of voters must be three-fourths or more of the whole of the voters). Those who do not vote are not counted. Notice is "duly" given when it satisfies the requirements of the Articles in that regard. Table A specifies "seven days' notice at the least."

A **SPECIAL** resolution is one passed by such a majority as is required for the passing of an extraordinary resolution and at a general meeting of which not less than twenty-one days' notice, specifying the intention to propose the resolution as a special resolution, has been duly given. If, however, all the members entitled to attend and vote at any such meeting so agree, a resolution may be proposed and passed as a special resolution at a meeting of which less than twenty-one days' notice has been given.

At any meeting at which a special resolution or, *semble*, an extraordinary resolution is proposed, a

declaration of the chairman that the resolution is carried is, unless a poll is demanded, conclusive evidence of the fact without proof of the number or proportion of the votes recorded in favour of or against the resolution. [cf. the decision in *Graham's Morocco Co.* in § 5 (e) above.]

The statutory regulations as to the demanding and taking of a poll have already been considered (§ 5 (g), *supra*).

In computing the majority on a poll reference must be had to the number of votes to which each member is entitled by virtue of the Act or of the Articles of the company.

Notice of a meeting is deemed to be duly given and the meeting to be duly held when the notice is given and the meeting held in manner provided by the Act or the Articles (§ 117).

The provisions of § 117 are intended for the protection of shareholders collectively and individually, so that if ALL the shareholders concur in the waiver of any of the formalities prescribed, *e.g.*, where no notice, or insufficient notice, is given, the Court will not solely on that account invalidate the proceedings (*In re Oxted Motor Co.* (1921), 3 K.B. 32; see also *Express Engineering Works Ltd.* (1920), 1 Ch. 466).

A company is bound by the unanimous agreement of all its members, so that if the particular business is *ultra vires* the directors, but within the powers of the company, the shareholders can effectively ratify it even if they do not meet together at one time and in one place, but all discuss and agree it with one another separately (*Parker & Cooper v. Reading* (1926), 1 Ch. 975).

By the provisions of the Act, certain matters cannot be effected except by or with the authority of a special resolution, *e.g.*—

The alteration of the Articles (§ 10).

The reduction of capital (§ 55).

The changing of the name of the company (§ 19).

The alteration of the objects clause of the Memorandum (§ 5).

The creation of a reserve liability (§ 49).

The Articles may provide that certain matters shall be effected by resolutions passed by specified majorities, and the Act demands exceptional forms of resolution for particular purposes. Thus by § 153 of the Act a majority in number amounting to three-fourths in value of those present and voting either in person or by proxy, is necessary to bind a class of creditors or contributories to a compromise.

Should adjournment be necessary of a meeting either of the company, or of the holders of any class of shares, or of the directors, a resolution passed at the adjourned meeting is deemed to have been passed on the date on which it was in fact passed and not as on any earlier date (§ 119).

(1) Filing Resolutions.

There must be forwarded to the Registrar of Companies for record by him, a printed copy of each of the following, within 15 days of the resolution being passed or the agreement made :—

(a) special resolutions ;

(b) extraordinary resolutions ;

(c) resolutions which have been agreed to by all the members of a company, but which,

if not so agreed to, would not have been effective for their purpose unless, as the case may be, they had been passed as special resolutions or as extraordinary resolutions ;

(d) resolutions, or agreements which have been agreed to by all the members of some class of shareholders, but which, if not so agreed to, would not have been effective for their purpose unless they had been passed by some particular majority or otherwise in some particular manner, and all resolutions or agreements which effectively bind all the members of any class of shareholders though not agreed to by all those members ;

(e) resolutions requiring a company to be wound up voluntarily, passed under § 225 (1) (a) when the period fixed for the duration of the company by the Articles expires or the event occurs on the occurrence of which the Articles provide that the company is to be dissolved.

If a company fails to comply with this requirement, the company and every officer (including the liquidator) of the company who is in default is liable to a default fine of two pounds.

Where Articles have been registered, a copy of every such resolution or agreement for the time being in force must be embodied in or annexed to every copy of the Articles issued after the passing of the resolution or the making of the agreement.

Where Articles have not been registered, a printed copy of every such resolution or agreement must be forwarded to any member at his request, on payment of one shilling or such less sum as the company may direct.

If a company fails to comply with either of the last two requirements, the company and every officer (including the liquidator) of the company who is in default is liable to a fine not exceeding one pound for each copy in respect of which default is made (§ 118).

§ 6.—The Common Seal.

Every company must, for the purpose of signification of assent, possess a common seal upon which its name must be engraven in legible characters (§ 93).

The seal is used for all important documents, such as, *inter alia*, contracts by deed, mortgages, share certificates and debentures. Subject to the Articles, it can be affixed without authentication, but it is usual for two directors and the secretary to attest it.

The seal may be affixed by any person who has authority to manage the affairs of the company (*Barned's Banking Co., ex parte Contract Corporation* (1867), 3 Ch. App. 105).

Until the contrary is strictly proved, it is presumed that the seal has been regularly affixed to any document on which it appears (*Clarke v. Imperial Gas Co.* (1833), 4 B. & Ad. 315).

The wrongful and unauthorised use of the seal of the company amounts to a forgery, and is not binding on the company (*Merchants of the Staple of England v. Bank of England* (1888), 21 Q.B.D. 160; *Ruben v. Great Fingall Consolidated Co.* (1906), A.C. 439).

A company whose objects require or comprise the transaction of business in foreign countries may, if

authorised by its Articles, have for use in any territory, district, or place not situate in the United Kingdom, an "Official Seal," which is a facsimile of the common seal of the company, with the addition on its face of the name of every territory, district, or place where it is to be used.

A deed or other document to which an official seal is duly affixed binds the company as if it had been sealed with the common seal of the company.

A company having an official seal for use in any such territory, district or place may by writing, under its common seal, authorise any person appointed for the purpose in that territory, district or place, to affix the official seal to any deed or other document to which the company is party in that territory, district or place.

The authority of any such agent as between the company and any person dealing with the agent, continues during the period, if any, mentioned in the instrument conferring the authority, or if no period is there mentioned, then until notice of the revocation or determination of the agent's authority has been given to the person dealing with him.

The person affixing any such official seal must by writing under his hand, certify on the deed or other instrument, to which the seal is affixed, the date on which and the place at which it is affixed (§ 32).

A company may, by writing under its common seal, empower any person, either generally or in respect of any specified matters, as its attorney, to execute deeds on its behalf in any place not situate in the United Kingdom. A deed signed by such an attorney on behalf of the company and under his seal will be as binding on the company as if given under the common seal of the company (§ 31).

In favour of a purchaser, a deed is deemed to have been duly executed by a company if its seal is affixed thereto in the presence of its secretary or other permanent officer or his deputy, and a member of its board of directors; and where a seal purporting to be the seal of the company has been affixed to a deed, attested by persons purporting to be persons holding such offices, the deed is deemed to be duly executed (Law of Property Act, 1925, § 74 (1)).

§ 7.—Contracts, Conveyances and Actions.

The artificial nature of the company, by virtue of which it exists as a separate entity apart from its members, is such that it cannot engage in contractual relationships or other forms of legal activity except through some human agency.

Contracts on behalf of a company may be made as follows :—

- (a) A contract which if made between private persons would be by law required to be in writing, and if made according to English law to be under seal, may be made on behalf of the company in writing under the common seal of the company.
- (b) A contract which if made between private persons would be by law required to be in writing, signed by the parties to be charged therewith, may be made on behalf of the company in writing signed by any person acting under its authority, express or implied.
- (c) A contract which if made between private persons would by law be valid although made by parol only, and not reduced into writing, may be made by parol on behalf

of the company by any person acting under its authority, express or implied.

A contract made as above is effectual in law, and binds the company and its successors and all other parties thereto.

Such a contract may be varied or discharged in the same manner in which it is made.

A deed to which a company is a party is held to be validly executed in Scotland on behalf of the company if it is executed as above or is sealed with the common seal of the company and subscribed on behalf of the company by two of the directors and the secretary of the company, and such subscription on behalf of the company is binding whether attested by witnesses or not (§ 29).

The board of directors or other governing body of a company may, by resolution or otherwise, appoint an agent, either generally or in any particular case, to execute on behalf of the corporation any agreement or other instrument not under seal in relation to any matter within the powers of the corporation (Law of Property Act, 1925, § 74 (2)).

Where a person is authorised under a power of attorney or under any statutory or other power to convey any interest in property in the name or on behalf of a company, he may as attorney execute the conveyance by signing the name of the corporation in the presence of at least one witness, and in the case of a deed by affixing his own seal, and such execution takes effect and is valid in like manner as if the corporation had executed the conveyance (*ibid.* § 74 (3)).

Where a company is authorised under a power of attorney or under any statutory or other power to

convey any interest in property in the name or on behalf of any other person (including another company), an officer appointed for that purpose by the board of directors or other governing body of the company, by resolution or otherwise, may execute the deed or other instrument in the name of such other person; and where an instrument appears to be executed by an officer so appointed, then in favour of a purchaser the instrument is deemed to have been executed by an officer duly authorised (*ibid.* § 74 (4)).

Notwithstanding the provisions of § 74 of the Law of Property Act, any mode of execution or attestation authorised by law or by practice or by the Statute, Charter, Memorandum or Articles, Deed of Settlement or other Instrument constituting the company or regulating the affairs thereof, is (in addition to the modes above-mentioned) as effectual as if that section had not been passed (*ibid.* § 74 (6)).

As regards legal proceedings relating to a company, it is a settled rule of law that in order to redress a wrong done to the company, or to recover money or damages alleged to be due to it, the action should *prima facie* be brought by the company itself (*Foss v. Harbottle* (1843), 2 Harc 461, and *Mozley v. Alston* (1847), 1 Ph. 790). Where, however, the persons against whom relief is sought hold a controlling interest, and by the exercise of their voting powers prevent any action being taken by the company, an action may be brought by the minority shareholders in their own names. The cases in which this procedure can be adopted are confined to those in which the acts complained of constitute a fraud on the minority or are *ultra vires* the company (*Alexander v. Automatic Telephone Co.* (1900), 2 Ch. 56; *Simpson v. Westminster Palace Hotel Co.* (1860), 8 H.L. C. 712).

For example, where the majority are endeavouring, directly or indirectly, to appropriate to themselves money, property or advantages which belong to the company, or in which the other shareholders are entitled to participate, an action can be maintained by the minority (*Menier v. Hooper's Telegraph Works* (1874), 9 Ch. App. 350). In this case, the majority of the members of the A company were also shareholders of the B company. At a meeting of the A company, a resolution was passed to compromise an action between the two companies in a manner favourable to the B company. It was held that the minority members of the A company could have the compromise set aside.

In cases where complaint is made of some internal irregularity the Courts will not interfere if the irregularity is such that it could be rectified at will by the majority (*Taylor v. Institute of Chartered Accountants* (1937), "Accountant," 10th July).

Where a limited company is plaintiff or pursuer in any action or other legal proceeding any judge having jurisdiction in the matter may, if it appears, by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs, and may stay all proceedings until the security is given (§ 371).

§ 8.—Bills of Exchange and Promissory Notes.

A bill of exchange or promissory note is deemed to have been made, accepted, or endorsed on behalf of a company if made, accepted, or endorsed in the name of, or by or on behalf or on account of, the company by any person acting under its authority (§ 30).

The company must have express or implied power to make or accept such negotiable instruments ; and it will only have such power when its regulations expressly give it, or when the regulations fairly construed show that the power exists by implication (*Peruvian Railways Co.* (1867), 2 Ch. App. 617), or when the power is properly incidental to the objects of the company (*Simpson's claim* (1887), 36 Ch. D. 532).

The directors and officers should be particularly careful to sign any such instruments "for and on behalf of the company," and should see that the name of the company is correctly given. If it is outside the company's powers to make or accept such instruments, neither the company nor its agents will be hable on them, but the agents signing will be hable for breach of warranty of authority (*Firbank & Humphreys* (1886), 18 Q.B.D. 54 ; *West London Commercial Bank v. Kitson* (1884), 13 Q.B.D. 360).

§ 9.—Borrowing by a Company.

A company may from its nature have an implied power to borrow, as in the case of an ordinary trading company (*General Auction Estate Co. v. Smith* (1891), 3 Ch. 432) ; and may, in the exercise of such a power, make or accept bills and other negotiable instruments (*Peruvian Railways Co.*, *supra*). It is always wise, however, to take express power to borrow in the objects clause of the Memorandum.

If a company has no power to borrow, or only a limited power, any loan to the company is null and void, and does not create an actionable debt so far as the advance transgresses the power of the company. The remedies of the lender in relation to that part

of the moneys advanced which the company had no power to borrow are—

- (1) If the moneys are still in the possession of the company, to obtain an injunction to restrain the company from parting with it.
- (2) If the moneys have been used to pay off creditors, then to be subrogated to the rights of these creditors, and to stand in their place for repayment (*Birkbeck Benefit Building Society* (1914), A.C. 398), but not with any priority over other creditors, even if the debts paid off had priority (*Wrexham, Mold & Connah's Quay Railway* (1899), 1 Ch. 440).
- (3) To bring an action against the directors who obtained the loan, for breach of warranty of authority (*Weeks v. Propert* (1873), 8 C.P. 427).

If the company has power to borrow, but the terms of the Articles qualify the powers of the directors to exercise the borrowing power of the company then anyone lending money to the company without knowledge that the requirements of the Articles have not been observed may, notwithstanding the directors excess of authority, be entitled to hold the company liable, since it is no part of his duty to see that the company complies with its own regulations (*Royal British Bank v. Turquand* (1856), 24 L.J. P.B. 327).

If, however, the lender did actually know of the non-compliance, the borrowing is irregular, and any securities given will be void (*Howard v. Patent Ivory Co.* (1888), 38 Ch. D. 156) unless the shareholders authorise the borrowing by alteration of the Articles or otherwise (*Irvine v. Union Bank of Australia*, (1877), 2 A.C. 366).

Under § 69 of Table A, borrowed moneys must not exceed in amount the issued share capital of the company without the sanction of the company in general meeting. It is wise to modify this restriction in the case of companies with a small capital, in order to avoid frequent general meetings when moneys have to be borrowed, *e.g.*, on bank overdraft.

No company can exercise any borrowing powers till it is entitled to commence business, under a penalty of £50 a day ; but a company may simultaneously offer for subscription and allotment shares and debentures, and may receive application moneys for debentures without contravening this provision (§ 94).

§ 10.—Statement to be Published by Banking and certain other Companies.

Every limited banking company, and insurance company (except any assurance company to which the provisions of the Assurance Companies Act, 1909, as to accounts and balance sheet to be prepared annually and deposited by such a company apply, if the company complies with those provisions), and every deposit, provident, or benefit society must, before it commences business, and also on the first Monday in February and the first Tuesday in August in every year during which it carries on business, make a statement in the form set out below, or as near thereto as circumstances admit.

A copy of the statement must be put up in a conspicuous place in the registered office of the company, and in every branch office or place where the business of the company is carried on.

Every member and every creditor of the company is entitled to a copy of the statement, on payment of a sum not exceeding sixpence.

If default is made the company and every director and manager of the company who knowingly and wilfully authorises or permits the default, is liable to a fine not exceeding five pounds for every day during which the default continues.

A company that carries on the business of insurance in common with any other business or businesses is deemed to be an insurance company (§ 131).

The following is the prescribed form of the statement :—

SEVENTH SCHEDULE

FORM OF STATEMENT to be published by BANKING and INSURANCE COMPANIES, and DEPOSIT, PROVIDENT, or BENEFIT SOCIETIES

* The share capital of the company is _____ divided into
shares of _____ each

The number of shares issued is _____

Calls to the amount of _____ pounds per share have been made
under which the sum of _____ pounds has been received

The liabilities of the company on the first day of January (or July)
were—Debts owing to sundry persons by the company

On judgment £
On specialty £
On notes or bills, £
On simple contracts £
On estimated liabilities, £

The assets of the company on that day were—

Government securities [*stating them*]
Bills of exchange and promissory notes, £
Cash at the bankers, £
Other securities, £

§ 11 —Service and Authentication of Documents.

A document may be served on a company by leaving it at or sending it by post to the registered office of the company.

Where a company registered in Scotland carries on business in England, the process of any Court in

* If the Company has no share capital the portion of the statement relating to capital and shares must be omitted

England may be served on the company by leaving it at or sending it by post to the principal place of business of the company in England, addressed to the manager or other head officer in England of the company. The person issuing out the process must send a copy thereof by post to the registered office of the company (§ 370).

A petition to wind-up must be served at the registered office, or if there is none, at the principal place of business (Companies Winding-up Rules, 1929, § 28).

A creditor is entitled to present a petition if he can show that the company is unable to pay its debts.

If the company owes him a sum exceeding £50 he may serve on the company by leaving it at the registered office, a written demand requiring the company to pay the sum so due, and if the demand is not complied with or the debt is not secured or compounded for to the reasonable satisfaction of the creditor within three weeks, the company will be deemed to be unable to pay its debts (§ 169).

A creditor for less than £50 can present a petition if he can show that the company is unable to pay its debts ; but the practice is to refuse the order (*Industrial Assurance Association* (1910), W.N. 245), unless there are special circumstances (*World Industrial Bank* (1909), W.N. 148).

Even if a winding-up order is made, the creditor in such a case will not be allowed his costs (*Herbert Standring & Co.* (1895), W.N. 99) unless creditors whose total claims exceed £50 support his petition (*Leyton & Walthamstow Cycle Co.* (1901), 50 W.R. 93).

In the case of companies registered outside Great Britain establishing a place of business in this country,

there must be registered with the Registrar the name of some one or more persons resident in Great Britain authorised to accept service of process and any notices required to be served on the company. Such process or notice will be sufficiently served if addressed to such person or persons and sent by post or left at the address so filed (§ 349).

A document or proceeding requiring authentication by a company may be signed by a director, secretary, or other authorised officer of the company, and need not be under its common seal (§ 33).

§ 12.—Arbitration.

Although provision was made under the now repealed § 119 of the Companies (Consolidation) Act, 1908 (which re-enacted §§ 72 and 73 of the Companies Act, 1862), enabling a company to refer to arbitration disputes arising between itself and any other person (the proceedings being taken under the Railway Companies Arbitration Act, 1859), no such provision is made in the Act of 1929, presumably by reason of the general application of the Arbitration Act, 1889, which was not in operation at the date of the original enactment of the above provisions.

If, upon the sale of the company's assets for shares in another company, the rights of a dissentient shareholder are valued by arbitration, the proceedings will be by arbitration under the Companies Clauses Consolidation Act, 1845 (§ 234).

SYNOPSIS OF CHAPTER IX.

MORTGAGES AND DEBENTURES.

§ 1.—MORTGAGES

2 —DEBENTURES

- (a) Terms of Issue
- (b) Stamp Duty on Issue
- (c) Forms of Security
- (d) Avoidance of Floating Charges
- (e) Property Chargeable
- (f) Perpetual or Irredeemable Debentures
- (g) Re-issue of Redeemed Debentures
- (h) Registered Debentures
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- (k) Terms endorsed on Debentures
- (l) Trustees
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3 —REGISTRATION OF MORTGAGES AND DEBENTURES

- (a) Company's Register of Charges
- (b) Registration with the Registrar of Companies

CHAPTER IX.

MORTGAGES AND DEBENTURES.

§ 1.—Mortgages.

A mortgage of freehold property is of the nature of a long lease (3,000 years) granted by one person (the mortgagor) to another (the mortgagee) as a security for money lent, with a condition that if the money is repaid on a certain day with interest at a rate to be agreed, the demise made in favour of the mortgagee automatically terminates. The borrower thus gets the full estate again free from the encumbrance of the mortgagee's lease. If the mortgagor does not exercise his contractual right to redeem on the appointed day he does not forfeit his interest in the mortgaged property, for he is deemed in equity to remain entitled to redeem the property, so long as it has not been sold, or foreclosed under an order of the Court, and provided redemption is sought within the limitation period of twelve years. This equitable right to redeem is termed the "equity of redemption."

A mortgage can be granted on leasehold property, but in this case the term is fixed for the unexpired period of the lease less 10 days.

Where subsequent mortgages are granted, the second or subsequent mortgages run for a term one day longer than the preceding mortgage.

Mortgages should be distinguished from ordinary leases; in the former case, the mortgagor continues

to enjoy possession of the property until default, whereas in the latter case, the leaseholder (lessee) takes possession for the term of the lease.

The right to the equity of redemption lasts for 12 years from the time the mortgagee takes possession upon default (provided there is no acknowledgment during the period of the right); but the right is lost altogether if an order of the Court for foreclosure (i.e., an order to the mortgagor to pay principal, interest and costs within six months from the date of the order) is not complied with, the order then being made absolute with the result that the mortgagor forfeits his whole interest in the mortgaged property which thereupon vests in the mortgagee as owner.

In respect of the property comprised in a mortgage, both the lender and borrower have a legal estate. The borrower has the fee simple or a leasehold interest, as the case may be, upon which he can sue, subject, of course, to the mortgage; and the lender has an interest in the nature of a leasehold which he can assign should he desire to do so.

An individual can raise money in an analogous manner by a charge upon chattels, which may be constituted by a bill of sale duly registered under the Bills of Sale Acts and otherwise complying with the regulations and formalities prescribed by law. Limited companies can borrow money in the same way, and in such cases, as in the case of mortgages, registration is necessary with the Registrar of Companies (§ 79), and entry must be made in the company's register of charges (§ 88). (*See* § 3 of this Chapter.) Debentures need not be registered as bills of sale (Bills of Sale Act, 1882, § 17), even if they are issued by a foreign company (*Clark v. Balm, Hill & Co.* (1908), 1 K.B. 667).

A company cannot give security for loans contracted in excess of its own power to borrow, and any securities purported to be so given are void (*Wenlock v. River Dee Co.* (1885), 10 A.C. 354). If it has power to borrow, however, it may give a mortgage or charge on any or all of its assets as security where there is express authority in the company's constitution (*Newton v. Anglo-Australian Investment Co.* (1895), A.C. 244), unless such uncalled capital is reserved under § 49 of the Act (*see* Chap. VII, § 20) (*Bartlett v. Mayfair Property Co.* (1898), 2 Ch. 28).

Where a particular loan to a company is made by a single lender, security by way of mortgage is frequently given; but where it is desired to borrow from various persons giving them recourse to the same security, a mortgage only meets the case if made to a trustee on behalf of the lenders, the latter receiving debentures as evidence of the company's liability to them.

§ 2 — Debentures.

The most ordinary form of borrowing is by the issue of debentures, or the creation of debenture stock.

The term "debenture" simply means a document acknowledging a loan made to a company, and does not necessarily imply that any charge is given on the assets for repayment, though such a charge does usually exist. Debentures are commonly issued in a similar manner to shares by means of a prospectus inviting applications; the money being payable usually by instalments on application, allotment, and specified dates.

Debenture stock is of the same character as debentures, but instead of each debenture being for a fixed

amount, the capital sum lent to the company is treated as a single stock, usually secured by a trust deed giving a mortgage or charge on certain property of the company in favour of trustees. By the terms of the trust deed, the capital sum is usually divided into units, and each stockholder is entitled to a certificate for his holding; and it may be provided that the stock may be dealt with in fractions of a pound with or without a limit.

For the purposes of the Companies Act, 1929, the term "debenture" includes debenture stock, bonds and any other securities of a company, whether constituting a charge on the assets of the company or not (§ 380).

A contract with a company to take up and pay for any debentures of the company may be enforced by an order for specific performance (§ 76); and where money has been lent upon an agreement to give security, specific performance of such agreement may also be decreed (*Hermann v. Hodges* (1873), 16 Eq. 18).

(a) Terms of Issue

Debentures may be issued at a discount, unless the Articles forbid. Particulars of any such discount (or of any allowance or commission in relation to the issue of the debentures) must be sent to the Registrar of Companies, and registered by him (§ 79 (9)). Commissions paid must also be shown in the prospectus or statement in lieu of prospectus (Fourth Sch. Part 1; Fifth Sch.); in the annual return (§ 108); and discounts paid must be disclosed in every balance sheet until written off (§ 44).

The holders of debentures issued at a discount, if entitled to vote, are entitled to vote on the face value,

and not on the issue price (*Day v. Kent Collieries, Ltd.* (1907), 23 T.L.R. 559).

Debentures issued at a discount cannot be exchanged during their currency for fully-paid shares of the same face value, as this would amount to the issue of shares at a discount (*Moseley v. Koffyfontein Mines* (1904), 2 Ch. 108); for the valid issue of shares at a discount, the provisions of § 47 must be complied with. (See Chap. VII, § 24.)

If, however, the debentures are due for repayment at par, then their exchange for fully-paid shares on the due date to an equal amount would be valid, as this is equivalent to paying for the shares in full. Similarly, during the currency of the debentures, the company might issue shares paid up to the value of the amount paid on the debentures; or during the currency of the debentures might, in order to secure an earlier discharge of the debentures, offer the holders an immediate consideration higher than the amount originally paid on the debentures, and shares paid up to the extent of that consideration would be validly issued.

(b) Stamp Duty on Issue.

Before any company issues debentures, it must communicate to the Inland Revenue the amount of the proposed issue, and pay a stamp duty of 2s. 6d. per cent. thereon (Revenue Act, 1903, § 7).

Debentures to bearer are charged with duty at the rate of 4s. for every £10 or fraction thereof, unless redeemable within three years, when the duty is 1s. per £10; or one year, when the duty is 6d. per £10.

Where the debentures are repayable at a premium, the stamp duty is based on the redemption value

(*Rowell & Son v. Commissioners of Inland Revenue*, (1897), 2 Q.B. 194); but if redeemable at par at a fixed date with an option on the part of the company to redeem earlier at a premium, the duty will be on the par value (*Knights Deep v. Commissioners of Inland Revenue* (1900), 1 Q.B. 217).

(c) **Forms of Security.**

Debentures may be of three kinds—

- (1) Ordinary or naked debentures, which give no charge of any kind on the assets of the company, and which are mere acknowledgments of a debt due from the company creating no rights beyond those of ordinary unsecured creditors.
- (2) Debentures which give a floating charge on the assets of the company.
- (3) Debentures which constitute an actual mortgage to trustees, with a deed of trust or covering deed.

The greatest security is, of course, obtained by an actual mortgage to trustees, since in the trust deed the specific charge on the fixed property of the company will be held by the trustees, and a floating charge given over the other assets of the company. It is important where there is a mortgage for the trustees to obtain possession of the title deeds, since, if they are left in the possession of the company a second mortgage accompanied by deposit of the deeds would give the second mortgagee priority over the first mortgagee; so also would an equitable mortgage by mere deposit of the title deeds. These consequences result from the principle that in the case of a mortgage affecting a legal estate, the mortgagee with whom the title deeds have been deposited has priority.

Other mortgages relating to the same property rank in the order of their registration under the Land Charges Act, 1925.

A debenture giving a floating charge, though ordinarily called a mortgage debenture, is not really a mortgage at all, but only gives the debenture holders a "floating" charge over the assets of the company. The meaning of this term "floating" is, that so long as the company continues to carry on its business the directors are, in spite of the charge, entitled to deal in any way they please in the ordinary course of business with the assets of the company (*Re Yorkshire Woolcombers' Association* (1903), 2 Ch. 284), and may make specific charges or alienations of property which will have priority over the debentures. As was said by Jessel, M.R., in *Re Colonial Trusts Corporation* ((1879), 15 Ch. D. 465), the "floating" charge "attaches to the property of the company in preference to its general liabilities, that is, its liabilities to creditors not secured by specific charge at the moment the business is put an end to, either by the appointment of a receiver in an action instituted by debenture holders against the company or at the commencement of the winding-up, when the company is wound up either compulsorily or voluntarily."

The weakness of a floating charge as a security lies in the fact that if fixed charges are subsequently created in respect of assets comprised within the floating charge, the fixed charges will rank prior to the floating charges in the satisfaction of claims out of the proceeds of the security. This priority will attach to a fixed charge even where the fixed chargee has notice of the existing floating charge save in the exceptional cases considered below. Thus, a company

having borrowing powers and still carrying on its business may give to a person advancing money to the company for the purpose of carrying on its business priority over debenture holders, whose debentures are a charge upon the undertaking of the company, and may secure the sum so advanced by the deposit of the company's title deeds (*Wheatley v. Silkstone Coal Co.* (1885), 29 Co. D. 715; *Colonial Trusts Corporation, supra*).

In order to preserve the priority of debenture holders, who take a floating charge, a clause is often inserted providing "that the charge hereby created is to be a floating security, but so that the corporation is not to be at liberty to create any mortgage or charge in priority to the said debentures." Such a clause is effective as between the company and the debenture holders, but

- (i) where the debenture charge affects real property, the person who secures possession of the title deeds will still rank first; and
- (ii) subsequent fixed charges will take precedence if the creditors secured by them had no notice, at the time their charge was created, of the clause in the floating charge providing for its priority.

The fact that charges have to be registered with the Registrar of Companies does not fix a subsequent chargee with notice of the existence of restrictions as to future charges (*Standard Rotary Machine Co.* (1906), 95 L.T. 829); and it was held in *Re Valletort Steam Laundry* ((1903), 2 Ch. 654), that even where debentures contained a restrictive clause, and some of the debentures were held by a bank, the bank would not be affected by constructive notice when deeds were deposited with the bank on behalf of the company as security.

(d) Avoidance of Floating Charges.

Where a company is being wound up, a floating charge on the undertaking or property of the company created within six months of the commencement of the winding-up is, unless it is proved that the company immediately after the creation of the charge was solvent, invalid, except to the amount of any cash paid to the company at the time of or subsequently to the creation of, and in consideration for, the charge, together with interest on that amount at the rate of five per cent. per annum (§ 266).

If debentures have been issued even after the date of the presentation of a petition for winding-up but before the date of the winding-up order, in circumstances which are beneficial to the company (e.g., in consideration of an advance to enable the wages of the staff to be paid), such debentures will be regarded as valid (*In re Park Ward & Co.* (1926), Ch. 828).

Action under § 266 will only avoid the charge created under the debenture, and will not affect the liability of the company for the debt. In *Re Parkes Garage (Swadlincote) Ltd.* ((1929) 166 L.T. 359), the company, being insolvent at the time, issued debentures to secure certain creditors, and later, paid off the debentures out of the proceeds of the sale of the business. It was held that although the charge could be avoided at the instance of the liquidator, he could not secure repayment of the money under § 266. It might, however, be open to him to sue for the recovery of the money on the ground that the payment constituted a fraudulent preference.

Where there is a failure to register a charge required to be registered under § 79 of the Act, the charge

becomes void against the liquidator and any creditor ; but failure to register in the company's own register of charges under § 88 does not affect the security of the lender. (*See* § 3 of this Chapter.)

(e) Property Chargeable.

A company having power to incur obligations and to borrow money is empowered also to charge its assets with the satisfaction of liabilities and debts, subject, however, to any limitations in its Memorandum or Articles. Even uncalled capital may be charged, but for this purpose the company's Articles of Association must give the power, and there must be nothing in the Memorandum to the contrary (*Re Phoenix Bessemer Steel Co.* (1875), 32 L.T. 854 ; *Re Pyle Works* (1891), 1 Ch. 173). In *Newton v. Anglo-Australian Investment Co.* ((1895), A.C. 244), the Judicial Committee of the Privy Council held that if there be power in the Memorandum, or power in the Articles and nothing in the Memorandum to the contrary, uncalled capital can be effectually charged.

The power to charge uncalled capital should be sufficiently precise. A power to mortgage the " property and rights " is sufficient, or a power to charge the " assets " (*Page v. International Agency* (1893), 68 L.T. 435), or a power to raise money " in such manner as the company may determine " (*Jackson v. Rainforth Coal Co.* (1896), 2 Ch. 340).

But the word " property " alone is not sufficient, and a power to borrow on the property of the company will not authorise a charge on the uncalled capital, for uncalled capital is only " property " potentially, that is to say when called up (*Irvine v. Union Bank of Australia* (1877), 2 A.C. 366) ; and even then the words " property both present and future " are insufficient (*Streatham Estates Co.* (1897), 1 Ch. 15).

Similarly a charge on "the undertaking and all property of which it (the company) now is or shall at any time become entitled" was held to be in-operative against the uncalled capital (*Re Russian Spratts Patent Ltd.* (1898), 2 Ch. 149).

It must be noticed that in order to make a charge on future capital effective, there must not only be power in the Memorandum or the Articles to give the charge, but the charge must actually be given by the debentures.

A charge on the uncalled capital cannot in any case extend to a reserve liability created under § 49 of the Act, *i.e.*, uncalled capital declared by special resolution to be incapable of being called up except in the event and for the purposes of the company being wound up (*Bartlett v. Mayfair Property Co.* (1898), 2 Ch. 28). Such a reserve liability can only be created by special resolution after the company is incorporated. An original Article purporting to create it, subject to the passing of a special resolution, can be altered before such special resolution is passed (*Malleson v. National Insurance Co.* (1894), 1 Ch. 200); but when once the special resolution under § 49 is passed it is not capable of revocation and the fund thereby established is preserved for the general creditors in liquidation (*Bartlett v. Mayfair Property Co.*, *supra*).

In the case of a guarantee company, it has similarly been decided that the guarantee fund cannot be charged in favour of debenture holders (*Re Irish Club Co.* (1906), W.N. 127); and since the guarantee is fixed by the Memorandum, this could only be altered with leave of the Court.

A company may, however, include in the debenture deed a provision for the payment to the

debenture holders of an additional sum out of the surplus assets upon the winding-up (*In re Cuban Land and Development Co. (1911), Ltd. (1921)*, 2 Ch. 147). In such a case, even though the debentures are redeemed at any time prior to the liquidation of the company, the right to such share in the surplus assets will still exist and will not be extinguished by the redemption.

(f) Perpetual or Irredeemable Debentures.

A company may issue irredeemable debentures, since "a condition contained in any debentures, or in any deed for securing any debentures, whether issued or executed before or after the commencement of this Act, shall not be invalid by reason only that the debentures are thereby made irredeemable or redeemable only on the happening of a contingency, however remote, or on the expiration of a period, however long, any rule of equity to the contrary notwithstanding" (§ 74).

The terms "perpetual" and "irredeemable" are not strictly synonymous. An irredeemable debenture might ordinarily be construed as being one which cannot be redeemed, but the expression is frequently used to describe debentures of which the holder is precluded from demanding payment, but which the company can redeem at its option. Such an interpretation must be established by the context (*Willey v. Joseph Stocks & Co. (1912)*, 2 Ch. 134). Where the company possesses such an option, the expression "perpetual" is regarded as the preferable one to employ.

(g) Re-issue of Redeemed Debentures.

Where a company has redeemed any debentures previously issued, then—

- (a) unless any provision to the contrary, whether express or implied, is contained in the Articles

or in any contract entered into by the company; or

- (b) unless the company has, by passing a resolution to that effect or by some other act, manifested its intention that the debentures shall be cancelled,

the company has power to re-issue the debentures, either by re-issuing the same debentures or by issuing other debentures in their place.

On a re-issue of redeemed debentures the person entitled to the debentures has the same priorities as if the debentures had never been redeemed.

Where a company has power to re-issue debentures which have been redeemed, particulars with respect to the debentures which can be so re-issued must be included in every balance sheet of the company.

Where a company has deposited any of its debentures to secure advances from time to time on current account or otherwise, the debentures are not deemed to have been redeemed by reason only of the account of the company having ceased to be in debit whilst the debentures remained so deposited.

The re-issue of a redeemed debenture or the issue of another debenture in its place is treated as the issue of a new debenture for the purposes of stamp duty, but it is not so treated for the purposes of any provision limiting the amount or number of debentures to be issued; but any person lending money on the security of a debenture so re-issued which appears to be duly stamped may give the debenture in evidence in any proceedings for enforcing his security without payment of the stamp duty or any penalty in respect thereof, unless he had notice or, but for his negligence, might have discovered, that the debenture was not

duly stamped, but in any such case the company is liable to pay the proper stamp duty and penalty.

Where any debentures which were redeemed before 1st November, 1929, are re-issued subsequently to that date, the re-issue of the debentures does not prejudice any right or priority which any person would have had under the Companies (Consolidation) Act, 1908 (§ 75).

(h) Registered Debentures.

Debentures may be made payable to a registered holder or to bearer. The object of making them payable to a registered holder is to meet the requirements of the money market and facilitate dealing. It simplifies the title, and enables the company to look to some specific person as the holder to whom it can make payments, and whose receipt is to be a sufficient discharge. A clause is usually inserted, providing that the title of the registered holder shall be free from any equities between the company and any intermediate holder.

Although a company is not bound to keep a register of debenture holders, such a register, if kept, must be open to the inspection of the registered holder of any such debentures, and of any holder of shares in the company, but subject to such reasonable restrictions as the company may in general meeting impose, so that not less than two hours in each day shall be allowed for inspection. The register may, however, be duly closed from time to time in accordance with provisions contained in the Articles or in the debentures or, in the case of debenture stock, in the stock certificates, or in the trust deed or other document securing the debentures or debenture stock, during such period or periods, not exceeding in the

whole thirty days in any year, as may be therein specified.

Every registered holder of debentures and every holder of shares in the company may require a copy of the register or any part thereof on payment of sixpence for every hundred words required to be copied.

A copy of any trust deed for securing any issue of debentures must be forwarded to every holder of any such debentures at his request on payment in the case of a printed trust deed of the sum of one shilling or such less sum as may be prescribed by the company, or, where the trust deed has not been printed, on payment of sixpence for every hundred words required to be copied.

If inspection is refused, or a copy is refused or not forwarded, the company and every officer of the company who is in default is liable to a fine not exceeding five pounds, and further to a default fine of two pounds a day.

The Court may by order compel an immediate inspection of the register or direct that the copies required shall be sent to the person requiring them (§ 73).

This register must not be confused with the register of charges which MUST be kept (*see* § 3 (a) of this Chapter).

Income stock certificates are regarded as equivalent to debentures, as, although carrying no charge on the assets of the company, they constitute an acknowledgment of indebtedness by the company; the holders of such certificates would possess the right of inspection of the register of debenture holders (if kept) (*Lemon v. Austin Friars Investment Trust Ltd.* (1926), Ch. 1).

Registered debentures are transferable in accordance with the terms stated therein. A proper instrument of transfer must be produced, otherwise the company must not register the transfer (§ 63).

Upon the transfer of registered debentures, unless the contrary is indicated in the terms of issue, the title acquired by the transferee will be subject to equities affecting the rights of the transferor, *e.g.*, he would take subject to the claim of the company to set off calls on shares held by the transferors against the debt (the debenture) due by the company (*Re China Steamship Co.* (1869), 7 Eq. 240).

An executor taking debentures as a beneficiary on the division of the estate, having previously been registered in his representative capacity on production of probate, is entitled to be registered as owner without executing a formal transfer to himself (*Edward v. Ransomes & Napier* (1930), 143 L.T. 594).

(j) Bearer Debentures.

By making debentures payable to bearer they are invested with the character of a negotiable instrument, so as—

- (1) To make them transferable free from equities.
- (2) To render the delivery of the debenture and any interest coupon a good discharge to the company.
- (3) To enable the bearer to sue the company in his own name, if necessary.
- (4) To ensure a good title to any person who acquires the debenture *bonâ fide* for valuable consideration, notwithstanding any defect in the title of the person from whom he acquires it.

In the case of bearer debentures it is necessary to make provision for payment of interest in accordance with the coupons annexed, for otherwise it would be necessary to insist on the production of the debenture for the payment of interest, and make some endorsement thereon of the payment. Where the repayment is not to be made till a distant date, or the debenture is a perpetual one, it is usual, in the first instance, to issue the debenture with a limited number of coupons, providing for the payment of interest for 10 or 20 years, and to make provision for the issue of further coupons when the original ones are exhausted by means of a talon which is to be produced to the company as a request for such new coupons.

Debentures to bearer are negotiable instruments by the custom of merchants, and transferable by delivery; it is not necessary to insert a provision that they shall be treated as negotiable (*Bechuana-land Exploration Co. v. London Trading Bank* (1898), 2 Q.B. 658; *Edelstein v. Schuler* (1902), 2 K.B. 144).

Bearer debentures issued in Scotland are valid and binding according to their terms (§ 77).

(k) Terms endorsed on Debentures.

The following conditions are usually endorsed on the instruments :—

- (1) All debentures of the series to rank *pari passu*.
- (2) As to keeping and inspection of register of debenture holders; only the registered holder to be recognised; non-recognition of trusts and equities.
- (3) Provisions as to transfer.

- (4) The right to pass free from equities.
- (5) Power of company to give notice to pay off.
- (6) Money to become immediately payable if company makes default in payment of interest, or goes into liquidation.
- (7) Power of a specified proportion of debenture holders to appoint a receiver upon default.
- (8) Provisions as to meetings of the debenture holders.

If these conditions are printed on the back of the debenture, they will not constitute a contract with the holder unless they are referred to on the face of the debenture (*Dunderland Iron Ore Co.* (1909), 1 Ch. 446).

Where debentures rank *pari passu*, they will be discharged rateably to the amount due both in respect of capital and interest, *i.e.*, in the event of a deficiency of assets, if the interest on some debentures is paid down to a later date than others, the interest due on each is to be added to the capital thereof, and a proportionate distribution of the assets made (*Re Midland Express Ltd.* (1913), 1 Ch. 499). If there were no such provision (*i.e.*, as ranking *pari passu*) in the terms of issue, and the debentures were serially numbered, they would rank in numerical order, if issued on the same date or otherwise according to the date of issue (*cf. Gartside v. Silkstone Co.* (1882), 21 Ch. D. 762).

(1) Trustees.

As already indicated it is usual to appoint trustees on behalf of the debenture holders. It is clear that for the absolute protection of the security they should take a mortgage of the property, and the title deeds

should be in their possession and not in the possession of the directors, since further charges ranking in priority to the debentures might in such circumstances be created. It is not possible to give the security to each debenture holder, and trustees are therefore appointed to represent them.

The duties of the trustees may be summarised as follows:—

- (1) To take charge of any documents of title or investments representing the security of the debentures.
- (2) To see that the security is maintained, *e.g.*, in the case of leases, to have leasehold redemption funds invested on behalf of the debenture holders, where such property is comprised in the security.
- (3) To see that the conditions upon which the debentures are issued are properly complied with.
- (4) To protect the interests of the debenture holders by the exercise of powers conferred by the trust instrument or by law, if the company makes default either in payment of interest or provision for repayment of capital.

A trust deed containing a charge on the assets of a trading company in favour of its debenture holders is not a bill of sale within the Bills of Sale Acts, 1878 and 1882, and does not require to be registered under those Acts (*Richards v. Overseers of Kidderminster* (1896), 2 Ch. 212).

Every holder of debentures is entitled to a copy of any trust deed relating thereto, if printed, for one shilling or such less sum as is prescribed by the

company ; and if not printed, on payment of sixpence per 100 words to be copied. The penalty for default in supplying this after demand is £5, and £2 per day for every day during which the default continues. Upon default the Court may, by order, direct that copies may be sent to the person requiring them (§ 73).

The trust deed will usually contain a clause giving the trustees power to appoint a receiver on the security becoming enforceable, and giving them wider powers than would be possessed by a receiver under the Law of Property Act, 1925. Power will also be given to them, even before entry, to sell the property, to lease it, to renew leases, to exchange for other suitable property, to modify subsisting contracts with regard to any part of the property, to compromise claims, to commence or defend actions, and generally to do all such acts respecting the trust premises as they could do if they had the actual ownership.

(m) Rights of Debenture Holders.

The holders of debentures in a public company are entitled to be furnished on demand without charge with a copy of the last balance sheet and the auditors' and other reports (§ 130). They also have a right of inspection of, and to require copies of entries in the register of debenture holders (if any is kept) as previously indicated in (*h*) above (§ 73).

(n) Remedies of Debenture Holders.

The holder of a naked debenture, *i.e.*, one which gives no charge on the assets, is an unsecured creditor. He may sue for the principal and interest due, and may issue execution ; or he may present a petition for winding-up, and may prove as an unsecured creditor in the liquidation.

Where there is a specific mortgage of freehold or leasehold property to trustees, the deed usually gives the trustees power on default to enter on the property, sell it, and distribute the proceeds among the debenture holders. If a power of sale is given by the instrument, the trustees may, when the occasion for exercising it arises, appoint a receiver.

If there be only a general charge, without an actual mortgage, the debenture usually provides that, if the security becomes enforceable, a majority of the debenture holders may exercise the power of sale and of appointing a receiver in circumstances analogous to those in which a mortgagee is empowered to sell, under the Law of Property Act, 1925. This power must be expressly given in the instrument itself (*Blaker v. Herts and Essex Waterworks* (1889), 41 Ch. D. 399).

If this power be not given, a debenture holder may, on default, bring an action on behalf of himself and others asking for a declaration of charge, accounts, the appointment of a receiver, and foreclosure or sale. He may also present a petition, and the mere fact that he has obtained the appointment of a receiver does not prevent his doing so (*Borough of Portsmouth Tramways* (1892), 2 Ch. 362); and under § 170 of the Act, if the company be unable to pay its debts, he can present a petition, even though the principal money is not yet due, but if no money is due to him he is a contingent or prospective creditor and must give security (§ 170 (1) (c)). Where there is a trust deed, however, a debenture holder cannot petition unless there is a direct obligation to pay to the debenture holder (*Uruguay Central Railway Co.* (1879), 11 Ch. D. 372).

Where the debenture holders have taken steps to enforce their charge by the appointment of a receiver, the charge will become "fixed," and the claim of a sheriff who has levied execution on the goods comprised within the charge will be defeated if the execution is not completed (*Davy & Co. v. Williamson & Sons* (1898), 2 Q.B. 194).

The commencement of an action, however, will not affect the rights of other parties, and the company can even validly make an issue of some of the remaining debentures of the same series so long as the issue is effected before the receiver is appointed (*Hubbard & Co.* (1898), W.N. 158).

If by the terms of the instrument the interest on debenture stock is made payable to trustees, no individual holder can bring an action against the company for non-payment, and if the interest is made payable at the offices of the company, there is no default until application has been made for payment at the offices of the company (*Escalera Silver Lead Co.* (1908), 25 T.L.R. 87).

Where a receiver is appointed, either by the Court or under powers in an instrument, the person making or obtaining the appointment must notify the Registrar within seven days, and the Registrar must enter the appointment in the register of charges. The penalty for failure is £5 a day (§ 86).

Every receiver or manager who has been appointed under the powers contained in any instrument (i.e., otherwise than by the Court) and has taken possession, must, once in every six months and on ceasing to act, file with the Registrar of Companies an abstract of his receipts and payments. This is to be filed within one month of the expiration of six months from the date of his appointment and of every

subsequent six months and within one month of his ceasing to act. All statements after the first must indicate the aggregate amount of his receipts and payments during all preceding periods since the receiver's appointment (§ 310).

Such receiver must also on ceasing to act notify the Registrar of the fact (§ 86). The penalty for failure in either of these cases is a fine not exceeding £5 a day.

A receiver appointed by the Court is required to pass his accounts with the Court, and is not required to file an abstract under § 310 of the Act.

A body corporate cannot be appointed as receiver (§ 306).

(o) Preferential Payments.

In the event of liquidation the preferential debts set out below have priority over debentures which only give a floating charge ; that is to say, that though the debenture holders are secured creditors, the preferential creditors must, if necessary, be paid out of the proceeds of the security.

In a winding-up there must be paid in priority to all other debts—

- (a) all parochial or other local RATES due from the company at the relevant date (*see* below), and having become DUE AND PAYABLE within TWELVE MONTHS next before that date, and all ASSESSED TAXES, land tax, property or income tax assessed on the company UP TO THE 5TH APRIL NEXT BEFORE that date, and NOT EXCEEDING in the whole ONE YEAR'S ASSESSMENT ;
- (b) all WAGES OR SALARY (whether or not earned wholly or in part by way of commission) of any CLERK OR SERVANT in respect of services rendered to the company during FOUR MONTHS before the relevant date, NOT EXCEEDING FIFTY POUNDS ;

- (c) all **WAGES** of any **WORKMAN** OR **LABOURER** not exceeding **TWENTY-FIVE POUNDS**, whether payable for time or for piece work, in respect of services rendered to the company during **TWO MONTHS** next before the relevant date.

Where, however, any labourer in husbandry has entered into a contract for the payment of a portion of his wages in a lump sum at the end of the year of hiring, he has priority in respect of the whole of such sum, or a part thereof, as the Court may decide to be due under the contract, proportionate to the time of service up to the relevant date ;

- (d) unless the company is being wound up voluntarily merely for the purposes of reconstruction or of amalgamation with another company, or unless the company has at the commencement of the winding-up under such a contract with insurers as is mentioned in § 7 of the Workmen's Compensation Act, 1925, rights capable of being transferred to and vested in the workman, **ALL AMOUNTS DUE IN RESPECT OF ANY COMPENSATION** or liability for compensation under the said Act accrued before the relevant date ;
- (e) Unless the company is being wound up voluntarily merely for the purposes of reconstruction or of amalgamation with another company, **ALL AMOUNTS** due in respect of **CONTRIBUTIONS** payable during the twelve months next before the relevant date by the company as the employer of any persons under either—
- (i) The National Health Insurance Acts, 1924 to 1936 ; or
 - (ii) The Widows', Orphans' and Old Age Contributory Pensions Act, 1925 to 1929 ; or

(iii) The Unemployment Insurance Act, 1935.

Where any compensation under the Workmen's Compensation Act, 1925, is a weekly payment, the amount due in respect thereof for the purposes of paragraph (d) above is taken to be the amount of the lump sum for which the weekly payment could, if redeemable, be redeemed if the employer made an application for that purpose under the said Act.

Where any payment on account of wages or salary has been made to any clerk, servant, workman or labourer in the employment of a company out of money advanced by some person for that purpose, that person has a right of priority in respect of the money so advanced and paid up to the amount by which the sum in respect of which that clerk, servant, workman or labourer would have been entitled to priority in the winding-up has been diminished by reason of the payment having been made.

The foregoing debts—

- (a) rank equally among themselves and must be paid in full, unless the assets are insufficient to meet them, in which case they abate in equal proportions ; and
- (b) in the case of a company registered in England, so far as the assets of the company available for payment of general creditors are insufficient to meet them, have priority over the claims of holders of debentures under any floating charge created by the company, and must be paid accordingly out of any property comprised in or subject to that charge.

Subject to the retention of such sums as may be necessary for the costs and expenses of the winding-up, the foregoing debts must be discharged forthwith

so far as the assets are sufficient to meet them, and formal proof of National Insurance contributions to which priority is given is not required except in-so-far as is otherwise provided by general rules.

In the event of a landlord or other person distraining or having distrained on any goods or effects of the company within three months next before the date of a winding-up order, the debts to which priority is given by this section are a first charge on the goods or effects so distrained on, or the proceeds of the sale thereof; but in respect of any money paid under any such charge, the landlord or other person has the same rights of priority as the person to whom the payment is made.

“The relevant date” above referred to means—

- (a) in the case of a company ordered to be wound up compulsorily which had not previously commenced to be wound up voluntarily, the date of the winding-up order; and
- (b) in any other case, the date of the commencement of the winding-up (§ 264).

If a receiver is appointed on behalf of the holders of any debentures of the company secured by a floating charge, or possession is taken by or on behalf of those debenture holders of any property comprised in or subject to the charge, then, if the company is not at the time in course of being wound up, the debts which in every winding-up are preferential payments must be paid out of any assets coming to the hands of the receiver or other person taking possession as aforesaid in priority to any claim for principal or interest in respect of the debentures.

The **RELEVANT DATE** in this case is the **DATE OF THE APPOINTMENT OF THE RECEIVER OR OF POSSESSION BEING TAKEN**, as the case may be.

Any payments so made must be recouped as far as may be out of the assets of the company available for payment of general creditors (§ 78).

If a receiver and manager, having received notice of a preferential claim, distributes the assets without reserving therefor, he will be personally liable in damages to the creditor (*Woods v. Winskill* (1913), 2 Ch. 303).

In the case of debentures conferring a floating charge, secured by a trust deed providing for the costs and remuneration of the trustees, then in the event of a deficiency of assets, the claims of preferential creditors can only be met after the payment of (1) costs of realisation; (2) costs including remuneration of receiver; (3) costs, charges and expenses of debenture trust deed including the trustees' remuneration; (4) costs of the action to enforce the charge (*In re Glyncorwg Colliery Co.* (1926), 1 Ch. 951).

Where debentures are secured by a fixed charge as well as a floating charge, the priority of preferential debts applies only to the property included in the floating charge, and not to that included in the fixed charge (*Lewis Merthyr Consolidated Collieries* (1929), 1 Ch. 498).

§ 3.—Registration of Mortgages and Debentures.

All mortgages and charges affecting the property of a company have to be entered in the register of charges, to be kept at the offices of the company, and also in the register kept by the Registrar of Companies.

(a) Company's Register of Charges.

Every company must cause a copy of every instrument creating any charge (this term includes a mortgage

(§79)), requiring registration to be kept at its registered office ; but in the case of a series of uniform debentures, a copy of one debenture of the series is sufficient (§ 87).

Every limited company must keep at its registered office a **REGISTER OF CHARGES**, and enter therein all charges specifically affecting property of the company and all floating charges on the undertaking or any property of the company, giving in each case a short description of the property charged, the amount of the charge, and, except in the case of securities to bearer, the names of the persons entitled thereto. If any director, manager, or other officer of the company knowingly and wilfully authorises or permits the omission of any such entry, he is liable to a fine not exceeding fifty pounds (§ 88).

The copies of instruments and the register of charges must be open during business hours (but subject to such reasonable restrictions as the company in general meeting may impose, so that not less than two hours in each day are allowed for inspection) to the inspection of any creditor or member of the company without fee, and the register of charges must also be open to the inspection of any other person on payment of such fee, not exceeding one shilling for each inspection, as the company may prescribe.

If inspection of the copies or register is refused, any officer of the company refusing inspection, and every director and manager of the company authorising or knowingly and wilfully permitting the refusal, is liable to a fine not exceeding five pounds, and a further fine not exceeding two pounds for every day during which the refusal continues. If any such refusal occurs in relation to a company registered in England, the Court may by order compel an immediate inspection of the copies or register (§ 89).

Where a company is incorporated outside England, but has established a place of business in this country, the above mentioned provisions will apply, should the company create any charge on its property situate in England (§ 90).

Failure to make the necessary entries in the company's register, though it entails penalties on those responsible, does not affect the validity or priority of the charges (*General South American Co.* (1876), 2 Ch. D. 337).

(b) Registration with the Registrar of Companies.

Every charge mentioned below and created after the stated date by a company registered in England is, so far as any security on the company's property or undertaking is conferred thereby, void against the liquidator and any creditor of the company, unless the prescribed particulars of the charge, together with the instrument, if any, by which the charge is created or evidenced, are delivered to or received by the Registrar of Companies for registration within twenty-one days after the date of its creation, but without prejudice to any contract or obligation for repayment of the money thereby secured, and when a charge so becomes void the money secured thereby immediately becomes payable.

The following are the charges referred to :—

(i) Created after 1st July, 1908 :

- (a) a charge for the purpose of securing any issue of debentures ;
- (b) a charge on uncalled share capital of the company ;
- (c) a charge created or evidenced by an instrument which, if executed by an individual, would require registration as a bill of sale ;

- (d) a charge on land, wherever situate, or any interest therein ;
 - (e) a charge on book debts of the company ;
 - (f) a floating charge on the undertaking or property of the company.
- (ii) Created after 1st November, 1929 :
- (g) a charge on calls made but not paid ;
 - (h) a charge on a ship or any share in a ship ;
 - (i) a charge on goodwill, on a patent or a licence under a patent, on a trademark or on a copyright or licence under a copyright.

In the case of a charge created out of the United Kingdom comprising solely property situate outside the United Kingdom, the delivery to and the receipt by the Registrar of a copy verified in the prescribed manner (i.e., under the seal of the company or under the hand of some person interested therein otherwise than on behalf of the company (Companies (Forms) Order, 1929)) of the instrument by which the charge is created or evidenced, has the same effect as the delivery and receipt of the instrument itself ; in this case the time within which the particulars and instrument or copy are to be delivered to the Registrar is 21 days after the date on which the instrument or copy could, in due course of post, and if despatched with due diligence, have been received in the United Kingdom.

Where a charge is created in the United Kingdom but comprises property outside the United Kingdom, the instrument creating or purporting to create the charge may be sent for registration notwithstanding that further proceedings may be necessary to make the charge valid or effectual according to the law of the country in which the property is situate.

Where a charge comprises property situate in Scotland or Northern Ireland and registration in the country where the property is situate is necessary to make the charge valid or effectual according to the law of that country, the delivery to and the receipt by the Registrar of a copy verified in the prescribed manner (*see above*) of the instrument by which the charge is created or evidenced, together with a certificate in the prescribed form stating that the charge was presented for registration in Scotland or Northern Ireland, as the case may be, on the date on which it was so presented has the same effect as the delivery and receipt of the instrument itself.

Where a negotiable instrument has been given to secure the payment of any book debts of a company, the deposit of the instrument for the purpose of securing an advance to the company is not treated as a charge on those book debts requiring registration.

The holding of debentures in another company entitling the holder to a charge on land is not deemed to be an interest in land and a charge on such debentures does not therefore fall within the section.

Where a series of debentures containing, or giving by reference to any other instrument, any charge to the benefit of which the debenture holders of that series are entitled *pari passu* is created by a company, it is sufficient if there are delivered to or received by the Registrar within twenty-one days after execution of the deed containing the charge or, if there is no such deed, after the execution of any debentures of the series, the following particulars :—

- (a) the total amount secured by the whole series ;
and
- (b) the dates of the resolutions authorising the
issue of the series and the date of the covering

deed, if any, by which the security is created or defined ; and

(c) a general description of the property charged ; and

(d) the names of the trustees (if any) for the debenture holders ;

together with the deed containing the charge, or, if there is no such deed, one of the debentures of the series ; where, however, more than one issue is made of debentures in the series, there must be sent to the Registrar for entry in the register particulars of the date and amount of each issue, but an omission to do this does not affect the validity of the debentures issued.

Where any commission, allowance, or discount has been paid or made either directly or indirectly by a company to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any debentures of the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any such debentures, the particulars required to be sent for registration include particulars as to the amount or rate per cent. of the commission, discount, or allowance so paid or made, but omission to do this does not affect the validity of the debentures issued. The deposit of any debentures as security for any debt of the company is not for this purpose treated as the issue of the debentures at a discount.

The expression "charge" includes mortgage (§79).

It is the duty of the company to send to the Registrar of Companies particulars of every charge and of the issues of debentures of a series requiring registration, but registration of any such charge may be

effected on the application of any person interested therein.

Where registration is effected on the application of some person other than the company, that person is entitled to recover from the company the amount of any fees properly paid by him to the Registrar on the registration.

If any company makes default in sending to the Registrar for registration the particulars of any charge created by the company, or of the issues of debentures of a series, requiring registration, then, unless the registration has been effected on the application of some other person the company and every director, manager, secretary or other person, who is knowingly a party to the default is liable to a fine not exceeding fifty pounds for every day during which the default continues (§ 80).

Where a company registered in England acquires any property which is subject to a charge of any such kind as would, if it had been created by the company after the acquisition of the property, have been required to be registered, the company must cause the prescribed particulars of the charge, together with a copy (certified in the prescribed manner (*see above*) to be a correct copy) of the instrument, if any, by which the charge was created or is evidenced, to be delivered to the Registrar of Companies for registration within twenty-one days after the date on which the acquisition is completed. If, however, the property is situate and the charge was created outside Great Britain, twenty-one days after the date on which the copy of the instrument could in due course of post, and if dispatched with due diligence, have been received in the United Kingdom is substituted as

the time within which the particulars and the copy of the instrument are to be delivered to the Registrar. If default is made the company and every officer of the company who is in default is liable to a default fine of fifty pounds (§ 81), but failure to register does not avoid the charge as under § 79 in the case of charges created by a company.

The Registrar of Companies must keep, with respect to each company, a register in the prescribed form of all the charges requiring registration under the Act, and, on payment of the prescribed fee, enter in the register with respect to such charges the following particulars :—

(a) In the case of a charge to the benefit of which the holders of a series of debentures are entitled, the following particulars :

- (i) the total amount secured by the whole series ;
and
- (ii) the dates of the resolutions authorising the issue of the series and the date of the covering deed, if any, by which the security is created or defined, and
- (iii) a general description of the property charged ;
and
- (iv) the names of the trustees (if any) for the debenture holders ; together with the deed containing the charges, or, if there is no such deed, one of the debentures of the series.

(b) In the case of any other charge—

- (i) if the charge is a charge created by the company, the date of its creation ; and if the charge was a charge existing on property acquired by the company, the date of the acquisition of the property ; and

- (ii) the amount secured by the charge ; and
- (iii) short particulars of the property charged ; and
- (iv) the persons entitled to the charge.

The Registrar must give a certificate under his hand of the registration of any charge, stating the amount thereby secured, and the certificate is conclusive evidence that the requirements as to registration have been complied with.

The register kept by the Registrar is open to inspection by any person on payment of the prescribed fee, not exceeding one shilling for each inspection.

The Registrar must keep a chronological index, in the prescribed form and with the prescribed particulars, of the charges entered in the register (§ 82).

The prescribed fees are as follows :—

For registering any charge created by a company, where the charge does not exceed £200, ten shillings ; where the charge exceeds £200, £1.

For registering particulars of a series of debentures, where the total amount secured by the whole series does not exceed £200, ten shillings ; where it exceeds £200, £1.

For inspecting the register of charges kept by the Registrar, one shilling in each case.

The company must cause a copy of every certificate of registration to be endorsed on every debenture or certificate of debenture stock which it issues, and the payment of which is secured by the charge so registered ; but not on any debenture or certificate of debenture stock issued by the company before the charge was created.

If any person knowingly and wilfully authorises or permits the delivery of any debenture or certificate

of debenture stock which is required to have endorsed on it a copy of a certificate of registration, without the copy being so endorsed upon it, he is without prejudice to any other liability, liable to a fine not exceeding one hundred pounds (§ 83).

The Registrar of Companies may, on evidence being given to his satisfaction that the debt for which any registered charge was given has been paid, or satisfied, order that a memorandum of satisfaction be entered on the register, and must, if required, furnish the company with a copy thereof (§ 84).

The Court, on being satisfied that the omission to register a charge within the time required by the Act, or that the omission or mis-statement of any particular with respect to any such charge or in a memorandum of satisfaction, was accidental, or due to inadvertence or to some other sufficient cause or is not of a nature to prejudice the position of creditors or shareholders of the company, or that on other grounds it is just and equitable to grant relief, may on the application of the company or any person interested, and on such terms and conditions as seem to the Court just and expedient, order that the time for registration shall be extended, or, as the case may be, that the omission or mis-statement shall be rectified (§ 85).

If a trust deed has not been registered and the company sells property already mortgaged, and further property purchased with the proceeds is conveyed to the trustees for the debenture holders, this creates a new charge which must be registered, though it need not be endorsed on the certificates (*Cornbrook Brewery v. Law Debenture Corporation* (1904), 1 Ch. 103); but this is not the case if the trustees without intervention of the company effect a sale of mortgaged

property, and purchase with the proceeds other property which is conveyed to them direct, under powers given by the trust deed, provided the total amount secured is not increased (*Bristol United Breweries v. Abbot* (1908), 1 Ch. 279), nor where a substitution of specifically mortgaged property is made under powers in a registered trust deed containing a floating charge, since the floating charge need not identify each asset (*Cunard Steamship Co. v. Hopwood* (1908), 2 Ch. 564).

Where an extension of time is granted by the Court under § 85, the order will usually state that it is not to affect the rights of parties acquired prior to actual registration; so that if before registration actually takes place creditors issue execution, or the company goes into liquidation, the charge will be ineffective against such execution creditors, or against the general body of creditors (*Anglo-Oriental Carpet Co.* (1903), 1 Ch. 914; *Joplin Brewery Co.* (1902), 1 Ch. 79).

The time for registration runs from the creation of the charge; this will vary in different circumstances. In the case of an instrument expressly creating a mortgage or charge in favour of any person or persons the time will run from the date of the execution of the instrument (*Appleyard v. New London and Suburban Omnibus Co.* (1908), 1 Ch. 621). In the case of a single debenture carrying a fixed charge it will apparently run from the date of issue (*Defries & Co.* (1904), 1 Ch. 37.)

SYNOPSIS OF CHAPTER X.

THE DIRECTORS.

§ 1.—APPOINTMENT.

2.—QUALIFICATION OF DIRECTORS.

3.—DISQUALIFICATION OF DIRECTORS.

4.—REMUNERATION.

5.—MANAGING DIRECTOR.

6.—BOARD MEETINGS.

7.—REGISTER OF DIRECTORS AND MANAGERS.

8.—DIRECTORS AS AGENTS.

9.—SECRET PROFITS.

10.—INTEREST IN CONTRACTS.

11.—DISCLOSURE OF INTEREST IN PROSPECTUS OR STATEMENT IN LIEU
OF PROSPECTUS.

12.—DIRECTORS AS TRUSTEES.

13.—LIABILITY OF DIRECTORS.

14.—DISCLOSURE OF DIRECTORS' NAMES.

CHAPTER X.

THE DIRECTORS.

§ 1 — Appointment.

The management and control of the company's affairs are in the hands of the directors, who are usually, but not necessarily, members of the company. Their position is analogous to that of "managing partners appointed to fill that post by a mutual arrangement between all the shareholders" (*Automatic Self-Cleansing Filter Co. v. Cunningham* (1906), 2 Ch. 34). Directors are, however, distinguished from managing partners, in that their powers and duties are limited to the scope of the company's regulations, and to matters which are not by the Companies Act required to be dealt with by the company in general meeting. Moreover, directors will not in ordinary circumstances incur personal liability in respect of matters transacted on behalf of, and in connection with the company.

The first directors are usually appointed by the Articles ; but the Articles sometimes provide that they shall be appointed by the subscribers to the Memorandum, in which case it is usual to provide that, till the appointment is made, the subscribers shall themselves be the directors. If this last provision is lacking, the subscribers must hold a general meeting to do any business or acts until they appoint the

directors. It is usual for the signatories to meet in order to make the appointment of directors, but an appointment in writing signed by all the subscribers is effectual (*Great Northern Salt Works* (1890), 44 Ch. D. 472).

Except in the case of—

- (a) a company not having a share capital ; or
- (b) a private company ; or
- (c) a company which was a private company before becoming a public company ; or
- (d) a prospectus issued by or on behalf of a company after the expiration of one year from the date on which the company was entitled to commence business ;

a person is not capable of being appointed director of a company by the Articles, and must not be named as a director or proposed director of a company in a prospectus issued by or on behalf of the company, or as proposed director of an intended company in a prospectus issued in relation to that intended company, or in a statement in lieu of prospectus delivered to the Registrar by or on behalf of a company, unless, before the registration of the Articles or the publication of the prospectus, or the delivery of the statement in lieu of prospectus, as the case may be, he has by himself or by his agent authorised in writing—

- (a) signed and delivered to the Registrar of Companies for registration a consent in writing to act as such director ; and
- (b) either—
 - (i) signed the Memorandum for a number of shares not less than his qualification, if any ;
or
 - (ii) taken from the company and paid or agreed to pay for his qualification shares, if any ; or

- (iii) signed and delivered to the registrar for registration an undertaking in writing to take from the company and pay for his qualification shares, if any; or
- (iv) made and delivered to the registrar for registration a statutory declaration to the effect that a number of shares, not less than his qualification, if any, are registered in his name.

Where a person has signed and delivered an undertaking to take and pay for his qualification shares, he is, as regards those shares, in the same position as if he had signed the Memorandum for that number of shares.

On the application for registration of the Memorandum and Articles of a company, the applicant must deliver to the registrar a list of the persons who have consented to be directors of the company, and, if this list contains the name of any person who has not so consented, the applicant is liable to a fine not exceeding fifty pounds (§ 140).

Subsequent appointments will be made in accordance with any special Articles which have been registered or under the provisions of Table A, if its application has not been excluded by the special Articles. Clauses 73-80 of Table A, as contained in the First Schedule to the Act, provide that at the first ordinary meeting the whole of the directors, and at subsequent ordinary meetings one-third of the directors shall retire.

The directors to retire at subsequent ordinary meetings will be those who have been longest in office, but as between directors who were appointed at the same time, the determination must be by agreement or by lot. Retiring directors are eligible for re-election (Table A, cl. 74-75).

The company may appoint additional directors and appoint a rota for retirement; and the directors may also add to their number, but the person appointed must retire at the next ordinary meeting, though then eligible for re-election as an additional director (Table A, cl. 79-80).

The Articles may empower a third party to appoint directors (*British Murac Syndicate v. Alperton Rubber Co.* (1915), 2 Ch. 186).

Except in the case of a private company, every company registered after 1st November, 1929, must have at least two directors (§ 139).

Should provision be made by the Articles of a company, or by any agreement entered into between any person and the company for empowering a director or manager to assign his office as such to another person, any assignment so made is of no effect unless and until it has received the sanction of a special resolution of the company (§ 151).

The Articles commonly provide that a director who is or is about to go abroad may appoint a person approved by the board to be his "alternate director" to act in his place until his return, when the alternate director automatically ceases to act. The appointment or removal of an alternate director must be shown in the register of directors, and notice be filed with the Registrar of Companies.

§ 2.—Qualification of Directors.

The Act does not require a director to hold qualification shares; this is purely a matter for the Articles. If the Articles require a director to hold a specified share qualification, however, and he is not already

qualified, he must obtain his qualification within two months after his appointment, or such shorter time as the Articles may fix.

The first directors, if named in the Articles or in any prospectus, must take their qualification shares from the company ; other directors may acquire their qualification shares in any way, but will commit a breach of duty if they take such shares as a gift from promoters of the company or persons having contractual rights against it (*Hay's Case* (1875), 10 Ch. 593).

For the purpose of any provision in the Articles requiring a director or manager to hold a specified share qualification, the bearer of a share warrant is not deemed to be the holder of the shares specified in the warrant.

The office of director of a company is vacated if the director does not, within two months from the date of his appointment, or within such shorter time as may be fixed by the Articles, obtain his qualification, or if after the expiration of such period or shorter time he ceases at any time to hold his qualification.

A person so vacating office is incapable of being re-appointed director of the company until he has obtained his qualification.

If after the expiration of the specified period any unqualified person acts as a director of the company, he is liable to a fine not exceeding five pounds for every day between the expiration of the said period or shorter time or the day on which he ceased to be qualified, as the case may be, and the last day on which it is proved that he acted as a director (§ 141).

A director, being an agent of the company, must not make any secret profit, and therefore must

not take shares intended to qualify him to act as a director by way of gift from the promoter or any person having contracts with the company unless the fact is disclosed to and approved by the company. A director accepting such a gift is liable to account to the company for the value of the shares; but his holding of these shares will none the less constitute a qualification (*Carling's Case* (1876), 1 Ch. D. 115).

If a director takes his qualification shares from the promoter, to whom the director executes a blank transfer, he commits a misfeasance, since this enables the promoter to disqualify him at will (*Re London & South-Western Canal Co.* (1911), 1 Ch. 346).

The Articles often provide that if a director does not obtain his qualification shares within the specified time, he shall be deemed to have agreed to take them from the company, and they shall be allotted to him accordingly; in such a case, if he acts as director, or even without acting allows the time to expire before resigning his office he may be placed on the list of contributories in respect of the shares (*Isaac's Case* (1892), 2 Ch. 158).

If the share qualification is increased after the director has acquired the qualification required when he was elected, and he does not acquire the additional amount, he does not *ipso facto* vacate office, but if he continues to act as director he is presumed to have contracted to acquire the shares or take them from the company, and if he does not do so within a reasonable time the company may place him on the register for the shares (*Molyneux v. London, Birmingham & Manchester Insurance Co.* (1902), 2 K.B. 589). Although it was previously held that the name of a director who, as required by § 140 *supra*, has signed

and delivered to the registrar of companies an undertaking in writing to take up his qualification shares, must be placed on the register whilst the company was a going concern to make him liable in a subsequent liquidation (where the shares were not fully called up) (*Hutchinson's Case* (1895), 1 Ch. 226), it is now provided that where such an undertaking has been given, the director shall, as regards those shares, be in the same position as if he had signed the Memorandum for that number of shares, in which case he must be entered on the register (§§ 140 and 25).

If a director, not having acted, resigns within the stipulated time, he escapes liability (*Salisbury-Jones's Case* (1894), 3 Ch. 356).

If the Articles provide that a person shall not be eligible to be a director unless he possesses the necessary qualification shares, he must be in possession of them at the time of his election, otherwise the election is a nullity (*Jenner's Case* (1878), 7 Ch. D. 132).

If the Articles provide that the director shall hold the qualification shares in his own right, it is sufficient if he holds them as trustee; but not if he holds them as liquidator of a company (*Boschoek Proprietary Co. v. Fuke* (1906), 1 Ch. 148). Unless the Articles require a sole holding, shares held jointly with another are sufficient qualification (*Dunster's Case, re Glory Paper Mills* (1894), 3 Ch. 478).

The qualification of directors must be disclosed in any prospectus issued within two years of the company being entitled to commence business (Fourth Sch., Part III).

The acts of a director will be valid notwithstanding any defect that may afterwards be discovered in his appointment or qualification (§ 143).

A director who acts without acquiring his qualification shares may be entitled to his remuneration up to the date at which the office becomes vacated (*Salton v. New Beeston Cycle Co.* (1899), 1 Ch. 775).

§ 3.—Disqualification of Directors.

In general, any person may act as a director of a company except in so far as the Articles may exclude certain persons from the Board as, *e.g.*, infants or lunatics or persons not holding such qualification shares as may be prescribed.

Irrespectively, however, of the regulations contained in the Articles the following cannot act as directors of a company—

- (a) An undischarged bankrupt. It is provided by § 142 of the Act that if any person being an undischarged bankrupt acts as director of, or directly or indirectly takes part in or is concerned in the management of, any company except with the leave of the Court by which he was adjudged bankrupt, is liable on conviction on indictment to imprisonment for a term not exceeding two years, or on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding five hundred pounds, or to both such imprisonment and fine; but a person is not guilty of such an offence by reason that he, being an undischarged bankrupt, has acted as director of, or taken part or been concerned in the management of a company, if he was on 3rd August, 1928, acting as director of, or taking part or being concerned in the

management of that company and has continuously so acted, taken part, or been concerned since that date and the bankruptcy was prior to that date.

In England the leave of the Court for the above purposes must not be given unless notice of intention to apply therefor has been served on the Official Receiver in Bankruptcy, and it is the duty of the Official Receiver, if he is of opinion that it is contrary to the public interest that any such application should be granted, to attend on the hearing of and oppose the granting of the application.

For this purpose the expression "company" includes an unregistered company and a company incorporated outside Great Britain which has an established place of business within Great Britain (§ 142).

- (b) Persons declared by order of the Court to be incapable, without leave of the Court, of being a director of or directly or indirectly concerned in the management of a company for such period not exceeding five years as is specified by the order. The Court is empowered to make such an order (i) under § 217 of the Act, where in the winding-up of a company by order of the Court, the Official Receiver has made a further report on the statement of affairs stating that, in his opinion, a fraud has been committed by any promoter, director or officer. and (ii) under § 275, where a director has been declared to be liable without any limitation in respect of all the debts of the company where its business has been carried on in fraud of creditors.

- (c) A director who has failed in due time to obtain the requisite qualification specified by the Articles so as to vacate his office, and has not subsequently acquired that qualification (§ 141 (3, 4)).

The Articles may provide under what circumstances a director shall become disqualified; and they generally provide that a director's office shall cease if he becomes bankrupt (though this will not prevent a bankrupt being appointed a director (*Dawson v. African Consolidated Co.* (1898), 1 Ch. 6), but now, as regards acting, only subject to the leave of the Court (§ 142)), or if he accepts an office of profit under the company or ceases to hold his qualification shares. In such cases the office becomes *ipso facto* vacant on the happening of the event.

Clause 72 of Table A provides that a director shall vacate his office if he ceases to hold his qualification shares, holds any office of profit under the company other than that of managing director or manager, becomes bankrupt or lunatic, or is concerned or participates in the profits of any contract with the company.

If the qualification consists in the holding by the director of shares in his own right, and the director becomes bankrupt so that his shares would pass to his trustee in bankruptcy, he would become disqualified (*Sutton v. English & Colonial Co.* (1902), 2 Ch. 502), apart from the statutory disqualification under § 142 of the Act, and from any provisions in the Articles.

Articles sometimes disqualify a director who absents himself from meetings, etc. In order to be so disqualified, the director must absent himself voluntarily; a serious illness which prevented him from travelling

would not cause him to vacate office (*Mack's Olaim* (1900), W.N. 114).

A director, acting while unqualified, is liable to a fine of £5 for every day that he so acts (§ 141); and the company may recover any fees paid to him while disqualified (*Bodega Co.* (1904), 1 Ch. 276). In this case the disqualification arose from the action of the director in having secretly participated in contracts with the company.

A director can only be removed as provided by the Articles, usually by extraordinary or special resolution.

If the Articles do not provide for the removal of a director, the Articles must be altered to take the power to remove him before it can be done, otherwise there is no remedy till he retires by rotation (*Imperial Hydropathic Hotel Co. v. Hampson* (1882), 23 Ch. D. 1).

If the Articles contain a provision as to resignation, a director may resign in accordance therewith; but he can probably resign even if the Articles are silent. Notice of resignation cannot be withdrawn (*Glossop v. Glossop* (1907), 2 Ch. 370). In any case he can get rid of his qualification shares (if any) and render his office vacant thereby (§ 141).

§ 4.—Remuneration.

The remuneration of directors is usually fixed by the Articles, in which case it must be shown in any prospectus issued within two years of the company being entitled to commence business (Fourth Sch., Part III).

If not provided by the Articles, directors are not entitled to remuneration, but it may be voted by the

company in general meeting; and in either case when the liability to the directors has accrued, they may sue therefor or prove as an ordinary creditor in the winding-up of the company (*Orton v. Cleveland Co.* (1865), 3 H. & C. 868; *Beckwith's Case* (1898), 1 Ch. 324).

Where the remuneration is fixed by the Articles this does not form a contract between the company and the directors, but is nevertheless sufficient to indicate the terms upon which they agreed to act (*Swabey v. Port Darwin Gold Mining Co.* (1889), 1 Meg. 385; *Isaac's Case* (1892), 2 Ch. 158).

If the remuneration is fixed by the Articles "at the rate of" so much per annum, it is apportionable (*Salton v. New Beeston Cycle Co.* (1899), 1 Ch. 775); otherwise it is not (*Re Central De Kaap Gold Mines* (1899), 69 L.J. Ch. 18).

The remuneration, as fixed by the Articles, is to cover all expenses of attending board meetings, etc., and a director is not entitled to extra remuneration for this unless voted by the company in general meeting (*Young v. Naval, etc., Society* (1905), K.B. 687), and a director is not, unless the Articles provide, entitled to his fees free of income tax (*Boschoek Proprietary Co. v. Fuke* (1906), 1 Ch. 148).

Special remuneration voted to directors under power in the Articles cannot be charged to capital (*Ashton & Co., Ltd. v. Honey & others* (1907), 23 T.L.R. 253); but directors are entitled to their remuneration even though there are no profits (*Lundy Granite Co.* (1872), 26 L.T. 673).

Where a director holds qualification shares as a trustee of settled shares, it has been held that the fees belong to the estate as capital (*Re Francis Barrett v. Fisher* (1905), 74 L.J. Ch. 198). But where

a director of a company held qualification shares on behalf of that company in order to represent it on the board of another company, the fees received were in the nature of remuneration for services rendered, and he was entitled, in the absence of a contract to the contrary, to retain them for his own use (*Dover Coal Field Extension* (1908), 1 Ch. 65).

Remuneration voted by the shareholders in general meeting is in the nature of a gratuity, and not an amount to which the directors are entitled by right, even although the Articles may state that the remuneration of the directors shall be fixed by the company in general meeting (*Hutton v. West Cork Railway Co.* (1883), 23 Ch D. 654).

Remuneration based on a percentage of profits does not include a percentage of the profits made on the sale of the whole undertaking of the company (*Frames v. Bultfontein Mining Co.* (1891), 1 Ch. 140). But in the absence of special stipulations to the contrary, "profits," in cases where the rights of third parties come in, mean actual profits, and not necessarily the profits as shown by the profit and loss account, since the latter might not include gains and losses arising from causes not directly connected with the business, *e.g.*, capital profits (*Spanish Prospecting Co.* (1911), 1 Ch. 92). Since income tax is an appropriation of profits (*Ashton Gas Co. v. Attorney-General* (1906), A.C. 10), it is not deductible in arriving at a commission on "net profits" payable under an agreement (*Johnston v. Chestergate Hat Manufacturing Co.* (1915), W.N. 277). The term "profits" should therefore be defined in the Articles or agreement in such cases.

It is a misfeasance on the part of a director to take remuneration in excess of the amount that is payable,

and any directors who are parties to such payments are jointly and severally liable to refund the amount (*Leeds Estate Building Society v. Shepherd* (1887), 36 Ch. 787; *re Whitehall Court* (1887), 56 L.T. 280). The company, however, can ratify the payment of remuneration in excess of that prescribed by the Articles by altering the Articles or passing a special resolution (*Boschoek Proprietary Co. v. Fuke* (1906), 1 Ch. 148).

The remuneration due to the directors is not due to them in their characters as members, and they are ordinary creditors for it, and can rank with such as outside creditors (*Re New British Iron Co., ex parte Beckwith* (1898), 1 Ch. 324; *re A1 Biscuit Co.* (1899), W.N. 115). But they may not pay themselves fees in priority to outside creditors when the funds are not sufficient to pay anyone in full (*Gas Light Improvement Co. v. Terrell* (1870), 10 Eq. 168), or in case of the insolvency of the company pay up their calls and utilise the money so obtained to pay their own fees (*Re Washington Diamond Mining Co.* (1893), 3 Ch. 95). A board of directors, acting as a board, and passing a resolution adopting a balance sheet which includes directors' fees, does not bind the company to pay those fees; and a balance sheet so adopted and signed by directors pursuant to the Act is not a written promise by the company or its agents to pay the directors' fees, *i.e.*, the balance sheets are not acknowledgments of the fees for the purposes of the Statute of Limitations (*Coliseum (Barrow)* (1930), 2 Ch. 44).

Sometimes directors waive the whole or a portion of their fees. In such a case the minute book would contain a resolution of the board to that effect, although all the directors would require to be present

at the meeting, and to vote on the resolution. A verbal agreement between the liquidator of a company and the directors, and by the directors mutually with each and all the others, to forego directors' fees is valid (*West Yorkshire Darracq Agency, Ltd., v. Coleridge* (1911), 80 L.J. K.B. 1122).

Directors cannot sue for remuneration after the date at which they should have retired, if by their own neglect a meeting has not been called at which they might be re-elected; but they will be entitled to remuneration, while the company is a going concern, for the period during which they were actually directors, even though the duties of directors have practically ceased owing to the sale of the undertaking (*Re Consolidated Nickel Mines* (1914), 1 Ch. 883).

The directors of a company must, on a demand in that behalf made to them in writing by members of the company entitled to not less than one-fourth of the aggregate number of votes to which all the members of the company are together entitled, furnish to all the members within a period of one month from the receipt of the demand a statement, certified as correct, or with such qualifications as may be necessary, by the auditors of the company, showing, as respects each of the last three preceding years in respect of which the accounts of the company have been made up, the aggregate amount received in that year by way of remuneration or other emoluments by persons being directors of the company, whether as such directors or otherwise in connection with the management of the affairs of the company, and there must in respect of any such director who is—

- (a) a director of any other company which is in relation to the first-mentioned company a subsidiary company; or

- (b) by virtue of the nomination, whether direct or indirect, of the company a director of any other company ;

be included in the said aggregate amount any remuneration or other emoluments received by him for his own use whether as a director of, or otherwise in connection with the management of the affairs of, that other company.

It is, however, provided that—

- (i) a demand for such a statement is of no effect if the company within one month after the date on which the demand is made resolve that the statement shall not be furnished ; and
- (ii) it is sufficient to state the total aggregate of all sums paid to or other emoluments received by all the directors in each year without specifying the amount received by any individual.

In computing for this purpose the amount of any remuneration or emoluments received by any director, the amount actually received by him must, if the company has paid on his behalf any sum by way of income tax (including sur-tax) in respect of the remuneration or emoluments, be increased by the amount of the sum so paid.

If any director fails to comply with these requirements he is liable to a fine not exceeding fifty pounds.

“ Emoluments ” include fees, percentages and other payments made or consideration given, directly or indirectly, to a director as such, and the money value of any allowances or perquisites belonging to his office (§ 148).

It is not lawful in connection with the transfer of the whole or any part of the undertaking or property

of a company for any payment to be made to any director of the company by way of compensation for loss of office, or as consideration for or in connection with his retirement from office, unless particulars with respect to the proposed payment, including the amount thereof, have been disclosed to the members of the company and the proposal approved by the company.

Where such a payment is illegally made to a director, the amount received is deemed to have been received by him in trust for the company.

Where the payment is to be made to a director of a company in connection with the transfer to any persons, as a result of an offer made to the general body of shareholders, of all or any of the shares in the company, it is the duty of that director to take all reasonable steps to secure that particulars with respect to the proposed payment, including the amount thereof, are included in or sent with any notice of the offer made for their shares which is given to any shareholders.

If any such director fails to take reasonable steps as aforesaid, or if any person who has been properly required by any such director to include the said particulars in or send them with any such notice fails so to do, he is liable to a fine not exceeding twenty-five pounds, and if the requirements of the last foregoing paragraph are not complied with in relation to any such payment as is mentioned therein, any sum received by the director on account of the payment is deemed to have been received by him in trust for any persons who have sold their shares as a result of the offer made.

If in connection with any such transfer the price to be paid to a director of the company whose office

is to be abolished or who is to retire from office, for any shares in the company held by him is in excess of the price which could at the time have been obtained by other holders of the like shares or any valuable consideration is given to any such director, the excess or the money value of the consideration, as the case may be, is deemed to have been a payment made to him by way of compensation for loss of office, or as consideration for or in connection with his retirement from office.

The above provisions do not prejudice the operation of any rule of law requiring disclosure to be made with respect to any such payments as are mentioned or with respect to any other like payments made or to be made to the directors of a company (§ 150).

§ 5 —Managing Director.

If the Articles give power, as under Clause 68 of Table A, the directors may appoint one of their number as managing director, who will not be subject to retirement by rotation, and may fix his remuneration, which may be by way of salary, or commission, or participation in profits, or partly in one way and partly in another. A managing director is not a clerk or servant and is not entitled to preferential treatment in respect of arrears of salary or commission in the event of winding-up (*Newspaper Proprietary Syndicate* (1900), 2 Ch. 349). Unless the Articles contain power to appoint a managing director, the directors cannot delegate their authority (*Howard's Case* (1866), 1 Ch. App. 561).

A managing director may be appointed by the company in general meeting, but if the power is vested in the directors the appointment must be made by

them (*Logan v. Davies* (1911), 105 L.T. 419). Unless forbidden by the Memorandum, it is not *ultra vires* for a company to grant a retiring pension to a managing director, but where the Articles fix the remuneration of the directors and provide that the company may by resolution in general meeting grant any additional remuneration, it will be *ultra vires* the directors to grant such a pension to a managing director (*Normandy v. Ind, Coope & Co., Ltd.* (1908), 1 Ch. 84).

A covenant by a company to pay, in consideration of services rendered to the company by its managing director, an annuity to his widow, is neither incidental to the business nor for the benefit of the company, and is *ultra vires* unless specially authorised by the Articles or by resolution of the company; moreover, the managing director is not a person in the employment of the company so as to entitle his widow to a pension (*Lee Behrens & Co.* (1932), 2 Ch. 46).

A director who by the Articles is prohibited from voting on a contract with the company in which he is interested should not vote for his own appointment as managing director; but if he does so the appointment can be regularised by the company in general meeting (*Foster v. Foster* (1916), 1 Ch. 532).

§ 6.—Board Meetings.

The directors act by a meeting of the board of directors the proceedings at which are evidenced by minutes duly recorded and signed by the chairman of that or the next meeting (§ 120).

Sometimes the Articles provide that a document signed by all the directors shall be as effective as a resolution of the board, but unless this provision

is in the Articles the directors must meet for the purpose of acting in any matter (*D'Arcy v. Tamar Hill Railway Co.* (1867), L.R. 2 Ex. 158).

The Articles usually fix the quorum of directors necessary to transact business; if none be fixed, a majority of the board is necessary (*York Tramways Co. v. Willows* (1882), 8 Q.B.D. 685), or if well established, the number which usually acts (*Regent's Canal Ironworks* (1867), W.N. 79). Table A provides that the quorum for a meeting of directors may be fixed by the board and, if not so fixed, shall be three where the number of directors exceeds three, and shall in other cases be two.

A quorum must consist of those competent to act, and all proceedings at a meeting where there is not a quorum are invalid. If the Articles provide that directors may not vote on a matter in which they are interested, any directors interested in a matter under discussion cannot count towards a quorum (*Greymouth Point Elizabeth Railway & Coal Co.* (1904), 1 Ch. 32).

§ 7.—Register of Directors and Managers.

Every company must keep at its registered office a Register of its Directors or Managers containing with respect to each of them the following particulars:—

- (a) In the case of an individual, his present christian name and surname, any former christian name or surname, his usual residential address, his nationality, and, if that nationality is not the nationality of origin, his nationality of origin, and his business occupation, if any, or, if he has no business occupation but holds any other directorship

or directorships, particulars of that directorship or of some one of those directorships ; and

- (b) In the case of a corporation, its corporate name and registered or principal office.

The company must within 14 days from the appointment of the first directors of the company, send to the Registrar of Companies a return in the prescribed form containing the same particulars, and within 14 days from the date of any change among its directors or in any of the particulars contained in the register, a notification of the change or changes therein.

The register must during business hours (subject to such reasonable restrictions as the company may by its Articles or in general meeting impose, so that not less than two hours in each day be allowed for inspection) be open to the inspection of any member of the company without charge and of any other person on payment of one shilling, or such less sum as the company may prescribe, for each inspection. If any such inspection is refused or if default is made in maintaining the register or in filing returns, the company and every officer of the company who is in default is liable to a default fine, *i.e.*, a fine not exceeding £5 a day.

In the case of any such refusal, the Court may by order compel an immediate inspection of the register.

A person in accordance with whose directions or instructions the directors of a company are accustomed to act is deemed to be a director and officer of the company for the above purposes (§ 144).

A person is not deemed to be a person in accordance with whose directions or instructions the directors of a company are accustomed to act, by reason only that the directors of the company act on advice given by him in a professional capacity (§ 380 (2)).

§ 8.—Directors as Agents.

A company, being a "person," contracts as an individual; and yet, being an incorporeal person, it cannot act for itself, but must conduct all its business through agents.

The name given to these agents is immaterial. They may be called a "Council," a "Managing Committee," "Managers," or "Directors," or there may be one agent only, a "Managing Director"; but every public company registered after 1st November, 1929, must have at least two directors (§ 139). These are matters for the decision of the members; whatever the name given, they are the agents of the company, and in this capacity are governed by the ordinary laws of agency, as well as by the laws applying specially to companies. It is as well to observe that the directors acting collectively as a "board" constitute the agent for the company. Individual directors are not agents except where the Articles give power to delegate authority to particular directors, such as a managing director, and that power has been duly exercised.

The question of "agency" is too often overlooked. It is in one sense a protection to the directors, since like all other agents they are not liable on contracts entered into by them on behalf of the company, unless they personally take the liability on themselves by contracting in their own names, or by contracting ostensibly for the company, but not under its true name, *e.g.*, by omission of the word "limited." If they exceed their authority, their action being *ultra vires* the company, or not being duly ratified, they become liable to an action for breach of warranty of authority. A director cannot bind his fellow directors

or the company unless he has express authority to do so, and third parties are presumed to know any limitations which are imposed by the Articles.

If the directors contract in their own names, but expressly on behalf of the company and within their authority, that is sufficient to free them from personal liability; and it does not matter in what way this is done so long as some words appear showing that they purport to act on behalf of the company. The mere description of themselves as "directors" of such and such a company is not sufficient. Thus, where they say: "We, the undersigned, three of the directors, agree," the directors are personally liable (*McCollin v. Gilpin* (1881), 5 Q.B.D. 516).

It is of special importance that this rule should be strictly observed with regard to bills and acceptances on behalf of the company. Section 30 of the Act provides that a bill of exchange or a promissory note shall be deemed to have been made, accepted, or endorsed on behalf of a company, if made, accepted, or endorsed in the name of, or by or on behalf or on account of the company by any person acting under its authority. Section 26 (1), Bills of Exchange Act, 1882, provides that where a person signs a bill as drawer, endorser or acceptor, and adds words to his signature indicating that he signs for and on behalf of a principal or in a representative character, he is not personally liable thereon; but the mere addition to his signature of words describing him as an agent, or as filling a representative character, does not exempt him from liability. Section 26 (2) *ibid.*, provides that in determining whether a signature on a bill is that of the principal or that of the agent by whose hand it is written, the construction most favourable to the validity of the instrument shall be

adopted. Section 30 of the Companies Act does not require that the making, accepting, or endorsing shall be "expressed to be" on behalf of the company, and it is not therefore necessary that the signature should purport on the face of the instrument to be on behalf of the company, so long as the signature is evidently on behalf of the company. Thus, a bill of exchange addressed to the company and signed "A.B., C.D., Directors of the Company," bound the company and did not bind the directors, because it was evident, on the face of it, that it was the company who was the drawee (*Okell v. Charles* (1876), 34 L.T. 822). But in *Elliott v. Rax-Ironside* ((1925) 2 K.B. 301) where the directors had not only accepted a bill in similar terms but had also endorsed it, they were held to be liable on the endorsement as the endorsement would otherwise be meaningless and the liability of the company thereon was repugant to its liability as the purported acceptor of the bill. If the company had not been liable already, however, such an endorsement would clearly have bound the company and not the directors personally.

A promissory note in the form, "We, the directors of the A Company, Limited, promise to pay," signed J.B., T.S., with the seal of the company in the corner, was held to bind the directors personally (*Dutton v. Marsh* (1871), 6 Q.B. 361); the words here did not indicate that the signatures were in a representative capacity, but merely that the persons signing were connected in this way with the company. The form of the promissory note should have been: "The ———Company, Limited, promises to pay," and it should have been signed "For and on behalf of the Company, J.B., T.S., Directors."

In the case of *Chapman v. Smethurst* ((1909), 25 T.L.R. 383), the plaintiff sued the defendant on a promissory note which was in these terms: "Six months after demand I promise to pay to Mrs. M. Chapman the sum of £300 for value received, together with 6 per cent. interest per annum, J. H. Smethurst's Laundry and Dye Works, Limited, J. H. Smethurst, Managing Director." The words "J. H. Smethurst's Laundry and Dye Works, Limited," and "Managing Director," were impressed with a rubber stamp, the remainder of the note being in writing. It was held that the defendant was not personally liable on the note, the company being evidently the promisor, and the defendant only signing as agent.

But in *Landes v. Marcus & Davids* ((1909), 25 T.L.R. 478) where a cheque, drawn in favour of the plaintiff, was stamped near the top with the words "B. Marcus & Co., Limited," and was signed by the two defendants as follows: "B. Marcus, Director; S. H. Davids, Director; ——— Secretary," the space for the signature of the secretary being left blank, the defendants were held personally liable on the cheque. The name of the company did not appear anywhere except at the top of the cheque.

The company is liable on a bill signed on its behalf by a person having apparent authority even if in fact he had no actual authority (*Dey v. Pullinger Engineering Co.* (1921), 1 K.B. 77). In that case, two directors of a company which by its Articles gave power to the directors to authorise directors to draw bills on behalf of the company, drew a bill without specific authority. It was held that the company was liable in respect thereof since the two directors concerned in the above

transaction were "acting under its authority" within the meaning of what is now § 30 of the 1929 Act.

If directors of a company, which has no power to accept bills of exchange, do accept a bill in such a way as to purport to bind the company, they are liable to a *bond fide* holder for representing that they had an authority which they did not possess (*West London Commercial Bank v. Kitson* (1884), 13 Q.B.D. 360).

Where the Articles give the directors power to delegate to one or more of their own body such of the powers conferred on the directors as they may consider requisite for carrying on the business of the company, and to determine who shall be entitled to sign contracts and documents on the company's behalf, and a document purporting to be a guarantee is executed by a director A., in the form: "The X. Co., Ltd. (signed) A.," A. having previously written to the person to whom the guarantee was given, signing the letter "for and on behalf of 'the company,' A., Chairman," the persons to whom the guarantee is given are entitled to assume that the directors have authorised A. to sign contracts on behalf of the company, and the company is liable on the guarantee (*British Thomson-Houston Co. v. Federated European Bank* (1932), 2 K.B. 176).

It will be borne in mind that wherever a transaction not *ultra vires* the company is within the apparent authority of the directors, the company will be liable on the transaction even if the directors were not specifically authorised to embark upon it. This principle finds expression in the rule in *Royal British Bank v. Turquand* ((1856), 25 L.J., Q.B. 317), which has already been considered in another connection

(Chap. IV, § 1). Of course, where a director has exceeded his authority in circumstances which involve the company in liability, that director will be liable for breach of duty if any loss to the company has resulted.

§ 9.—Secret Profits.

While the directors are thus in some ways protected by their position as agents, they are on the other hand under the same liability as other agents for improper or negligent performance of their duties. They must on no account make any secret profit. Any secret benefit obtained by a director by reason of his position, or in the course of the company's business, whether it takes the form of a commission, or of qualification shares, or a sum of cash, is regarded as a bribe, and the director is accountable to the company for the amount.

This is especially the case where the advantage gained by the director is obviously at the expense of the company, even though the agreement to pay the bribe was made before he became a director, or the contract for sale or purchase was effected and the price fixed before the bribe was paid or agreed upon. Thus, where directors, having a discretion in the matter paid £3,500 to a promoter on account of preliminary expenses out of which the calls on their qualification shares were paid (*Englefield Colliery Co.* (1878), 8 Ch. D. 388); where a director purchased from the vendor 500 fully-paid vendor's shares at 50 per cent. below par (*Weston's case* (1879), 10 Ch. D. 579); and where a director took as a gift 200 fully-paid shares from the promoter (*Eden v. Ridsdale's Lamp Co.* (1889), 23 Q.B.D. 368), they were in each case compelled to make good to the company the advantage they had so gained.

This principle will apply whether the company is a going concern or in course of being wound up. In the former case the liability must be enforced by action; in the latter by misfeasance proceedings under § 276 of the Act.

Where a director has been promised a present of this nature he cannot enforce payment, for the consideration is corrupt (*Harrington v. Victoria Dock Co.* (1878), 3 Q.B.D. 549); but if, despite non-payment of the bribe, the company has, in consequence of it, paid an increased price, it can sue the briber for the excess (*Mayor of Salford v. Lever* (1891), 1 Q.B. 188).

Even if it cannot be shown that the gift was at the expense of the company, the director will be liable to make good to the company any secret advantages obtained in the course of his agency from the vendor or promoter. Thus where a director paid for his qualification shares upon the terms that if he wished to part with them the promoter would buy them from him at par, and this was done when the shares had become valueless, he was held liable to the company for the amount so received (*North Australian Territory Co., Archer's case* (1892), 1 Ch. 322).

§ 10.—Interest in Contracts.

A company may allow a director to make a contract, or to be interested in a contract, with the company, and the regulations very commonly make provision for this. A director who is in any way, whether directly or indirectly, interested in a contract, or proposed contract, with the company must, however, fully disclose his interest to the board. The

disclosure of a director's interest must be made at the meeting of the directors at which the question of entering into the contract is first taken into consideration, or if the director was not at that date interested in the contract, at the next meeting to be held after he became so interested. A general notice given by any particular director to the directors of a company that he is a member of a specified company or firm and is consequently to be regarded as interested in any contract which may subsequently be made with that company or firm, is deemed to be a sufficient declaration of interest in relation to any contract so made. Failure to comply with these provisions will involve liability to a fine not exceeding £100 (§ 149). Nothing in § 149 can be taken to prejudice the operation of any rule of law restricting directors from having any interest in contracts with the company (*ibid.*).

A director must not vote in respect of a contract in which he is interested unless empowered by the Articles to do so. He can, however, exercise his vote as a shareholder at a general meeting of the company (*North West Transportation Co. v. Beatty* (1887), 12 A.C. 589), and he would be regarded as so voting where no other inference could be drawn from the circumstances. Thus, where the five directors of a private company are the only shareholders, and at a meeting described in the minutes as a board meeting, they vote on a contract in which they are interested, the contract will be deemed to have been ratified by every shareholder, and they, being all present at the meeting, will be assumed to have waived all formalities and to have constituted the meeting a general meeting of shareholders (*In re Express Engineering Works Ltd.* (1920), 1 Ch. 466).

Where a resolution cannot be passed at a meeting of directors on account of the fact that a quorum of disinterested directors is not present, but there is a sufficient number present to enable a quorum to be obtained for each part by splitting the resolution into parts and taking a vote on each part separately, this will not be valid if the original resolution relates to what is in fact one whole transaction (*Re North Eastern Insurance Co.* (1919), 1 Ch. 198).

If the Articles do not contain a provision enabling directors to be interested in contracts with the company, the directors, being in a fiduciary position, must account to the company for any personal benefit derived from the use of the funds of the company in any way (*Imperial Mercantile Credit Association, v. Coleman* (1873), L.R. 6 H.L. 189).

The "interest" of directors may be indirect, e.g., where a resolution has been passed by the board issuing debentures to the bank as security for an overdraft granted to the company and personally guaranteed by the directors (*Victors v. Lingard* (1927), 1 Ch. 323).

§ 11 — Disclosure of Interest in Prospectus or Statement in Lieu of Prospectus.

In every prospectus or statement in lieu thereof there must be shown full particulars of the nature and interest of every director in the promotion of, or in the property proposed to be acquired by, the company, or where the interest of such director consists in being a partner of a firm, the nature and extent of the interest of the firm, with a statement of all sums paid or agreed to be paid to him or to the firm in cash or shares or otherwise by any person, either to induce him to become, or to qualify him as,

a director, or otherwise for services rendered by him or by the firm in connection with the promotion or formation of the company (Fourth Sch., Part 1).

§ 12.—Directors as Trustees.

Owing to the fiduciary character of the relation between directors and the company and its members, directors are to a certain extent trustees of the company. They are not trustees in the same way as a trustee under a settlement, since they have not the legal ownership of the property of the company, and their dealings with it are not in their own right but as agents for the company. They manage the company for the benefit of all the members including themselves.

They are trustees for their various powers, and any exercise of these powers in opposition to the interest of the company is a breach of trust, for which they are hable. Directors must indemnify the company in respect of a liability imposed upon it, if they abuse their powers to their own private advantage (*Eastern Shipping Co. v. Quah Beng Kee* (1924), A.C. 177). Directors are, however, trustees for the company and not for individual shareholders (*Percival v. Wright* (1902), 2 Ch. 421). The funds of a company are applicable only to the specific purposes shown in the Memorandum and are in that way impressed with the characteristics of a trust fund, and may be followed into the hands of any alienee who takes with notice of the breach of trust.

It was as being trustees that directors could not, before the Trustee Act, 1888, claim the benefit of the Statute of Limitations; and it is as trustees that they are now entitled to share in the benefits of that

Act, and may in the absence of fraud, claim the protection given by such Statute (*Re Lands Allotment Co.* (1894), 1 Ch. 616). In the case of a concealed fraud the Statute does not run until the fraud is discovered (*North American Land Co. v. Watkins* (1904), 2 Ch. 233).

§ 13.—Liability of Directors.

The directors of a company are liable for negligence or breach of trust in relation to the affairs of the company. While the company is a going concern the remedy is by an action at law, but if in the course of winding up a company it appears that any person who has taken part in the formation or promotion of the company, or any past or present director, manager or liquidator, or any officer of the company, has misapplied or retained or become liable or accountable for any money or property of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the Court may, on the application of the Official Receiver, or of the liquidator, or of any creditor or contributory, examine into the conduct of the promoter, director, manager, liquidator, or officer, and compel him to repay or restore the money or property or any part thereof respectively with interest at such rate as the Court thinks just, or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance or breach of trust as the Court thinks just; notwithstanding that the offence is one for which the offender may be criminally liable.

Such an order for payment of money is deemed to be a final judgment within the meaning of § 1 (1) (g), Bankruptcy Act, 1914 (*i.e.*, a bankruptcy notice may

be served on the person against whom the order is made, failure to comply with which will be an act of bankruptcy) (§ 276).

In order that the person applying under this section may succeed, he must show that there has been a breach of trust, that the breach has resulted in a pecuniary loss to the company, and that he is interested in the result of the application (*Bentinck v. Fenn*, (1887), 12 A.C. 652).

Where the charge against directors is of negligence, it is necessary to distinguish between want of due care and diligence and an honest error of judgment, since the former is negligence and the latter is not. In each case the Court will take into account the circumstances of the particular case, since such things as the character of the business, the number of the directors, and the provisions of the Articles, will be factors in determining whether or not negligence has taken place.

Where the negligence is of a negative character, i.e., the non-performance of a duty, the onus of showing that this is negligence rests on those bringing the charge (*Liverpool Household Stores* (1890), 59 L.J. Ch. 618). A director would not be liable for misfeasance committed by his co-directors without his knowledge, at board meetings at which he was not present (*Montrotier Asphalte Co.* (1876), 34 L.T. 716); nor is he liable for omitting to attend meetings of the board, since this is not the same as neglecting the duties which ought to be performed at those meetings (*Marquis of Bute's Case* (1892), 2 Ch. 100).

Where, however, a director sanctions a payment on behalf of the company, he is bound to make enquiries as to the purpose for which the payment is being made; if he does not do so, trusting to his co-directors,

he will be liable (*Joint Stock Discount Co. v. Brown* (1869), 8 Eq. 381).

In *Marzetti's* case ((1880), 42 L.T. 206), a director was present and voted at a meeting where a payment was made for preliminary expenses. He made no enquiry as to the purpose of the payment, but it was in fact for expenses incurred in fraudulently raising the price of the company's shares in the market. It was held that the director was liable to repay the amount, because, though his liability is not governed by the strict rules applied in the case of trustees, he is bound to show reasonable diligence.

A director will not, however, be liable for improper payment sanctioned by him *bonâ fide* on the report of a committee that it was proper (*Montrotier Asphalte Co., supra*).

A director is bound to exercise the trust which he has accepted with fidelity and reasonable diligence (*Charitable Corporation v. Sutton* (1742), 2 Atk. 405), and is bound to use fair and reasonable diligence in the discharge of his duties, and to act honestly, but he is not bound to do more (*Forest of Dean Coal Co.* (1878), 10 Ch. D. 450).

In addition to negligence the directors will be liable for any misfeasance amounting to a breach of trust; by misfeasance is meant a breach of duty not involving misapplication, but resulting in a loss to the company, e.g., to allot shares in the names of his own infant children (in which case the director was ordered to pay the calls as damages) (*Re Crenver, etc., Co.; ex parte Wilson* (1872), 8 Ch. App. 45), or to take a bribe (*Pearson's Case* (1877), 5 Ch. D. 336); whereas by the term "breach of trust" is meant some misapplication of the company's funds.

Where a breach of trust or misfeasance is committed all those directors directly implicated therein are liable and so also are those who have notice without actually participating therein. A director is not liable, however, for that which occurred before he became a director (*Forest of Dean Coal Co., supra*).

Primarily speaking, a director is only liable for his own personal wrong, or for the wrong of his co-directors, or of any other agent of the company, which he has expressly authorised or connived at; but if he be brought into Court upon proceedings against his co-directors he will probably be left to pay his own costs.

Directors who take no part in a breach of trust and have no notice of it, are not liable for the acts of their co-directors; but if a director be put upon enquiry and he neglects to ascertain for himself, he may be dealt with as if he had notice of the breach of trust (*Land Credit Co. v. Lord Fermoy* (1870), 5 Ch. App. 763).

Directors who are jointly implicated in a breach of trust, whether it results in gain to them or not, are as a rule jointly and severally liable to the company in respect of it; but a director is not liable for more than the consequence of his own acts or defaults, or for his own receipt when the breach of trust committed by him is separable from breaches committed by his co-directors. Thus in *Madrid Bank v. Pelly* ((1869), 7 Eq. 442), the Court declined to make any order in respect of the breach of trust committed by the directors in paying a gross sum to the promoters, the latter not being parties to the suit; but held the defendants liable to refund the sums they had respectively received back from the promoters, such

receipts by them of moneys really belonging to the company being in effect separate breaches of trust.

Contribution may be ordered between co-directors who are jointly implicated in a breach of trust. It would seem that contribution could be claimed even where the breach of trust was also a tortious act and wrongful in itself (Law Reform (Married Women and Tortfeasors) Act, 1935) (*Ashurst v. Mason* (1875), 20 Eq. 225).

If in any proceeding for negligence, default, breach of duty, or breach of trust against a person who is one of the directors, managers or officers of a company; or one of the persons employed by a company as auditors, whether they are or are not officers of the company, it appears to the Court hearing the case that that person is or may be liable in respect of the negligence, default, breach of duty or breach of trust, but that he has acted honestly and reasonably, and that, having regard to all the circumstances of the case, including those connected with his appointment, he ought fairly to be excused for the negligence, default, breach of duty or breach of trust, that Court may relieve him, either wholly or partly, from his liability on such terms as the Court may think fit.

Where any such person has reason to apprehend that any claim will or might be made against him in respect of any negligence, default, breach of duty or breach of trust, he may apply to the Court for relief, and the Court on any such application has the same power to relieve him as it would have had if it had been a Court before which proceedings against that person for negligence, default, breach of duty or breach of trust had been brought.

Where the case is being tried by a judge with a jury, the judge, after hearing the evidence, may, if he is

satisfied that the defendant ought in pursuance of that subsection to be relieved either in whole or in part from the liability sought to be enforced against him, withdraw the case in whole or in part from the jury and forthwith direct judgment to be entered for the defendant on such terms as to costs or otherwise as the judge may think proper (§ 372).

This relief has been granted to a director who had acted *ultra vires* but honestly and reasonably and on the advice of counsel, which proved to be erroneous (*In re Claridge's Patent Asphalt Co.* (1921), 1 Ch. 543).

It is now possible, since the abolition of the principle *actio personalis moritur cum persona* by the Law Reform Act, 1934, for proceedings to be taken against the estate of a deceased director in respect of his negligence in the conduct of the affairs of the company. In any case, if the claim be in the nature of a breach of trust such as the payment of dividends out of capital, then the estate will be liable (*Masonic & General Life Co. v. Sharpe* (1892), 1 Ch. 154).

Probably also, since a debt of this nature may be held to have been incurred by fraud, or fraudulent breach of trust, the director will not, in the event of his bankruptcy, be freed from it by his discharge (*Emma Silver Mining Co. v. Grant* (1881), 17 Ch. D. 122).

Although directors can, in proper circumstances, seek relief under the provisions of § 372, the company itself cannot indemnify them against the consequences of their negligence. Prior to the Act of 1929 it was not an uncommon practice for a clause to be inserted in the Articles indemnifying directors, auditors, and other officers of the company against the consequences of

acts done in the course of their several duties by which loss may result to the company, except where such loss arises from wilful neglect or default, but such indemnifying clauses, whether contained in the Articles or in any contract with the company or elsewhere, are now void (§ 152). A company may, however still effectively undertake to indemnify a director, manager, officer or auditor against any liability incurred by him in defending any proceedings, whether civil or criminal, in which judgment is given in his favour or in which he is acquitted, or in connection with any application under § 372 in which relief is granted to him by the Court (§ 152).

Directors and officers of the company may also be liable for offences committed in the following circumstances :—

- (1) Under § 362, for making false statements in reports, certificates, balance sheets, etc.
- (2) Under § 272, for destruction, mutilation, falsification, etc., of books, papers or securities.
- (3) Under § 271, for various offences analogous to those applicable to a debtor under § 154 of the Bankruptcy Act, 1914, as amended by the Bankruptcy Act, 1926.
- (4) Under § 274, where proper books of account have not been kept by the company throughout the period of two years immediately preceding the commencement of a liquidation.
- (5) Under § 275, where any business of the company has been carried on with intent to defraud creditors.
- (6) Under § 5 of the Perjury Act, 1911, for making false statements in accounts, balance sheets, reports, etc.

- (7) Under §§ 82-84 of the Larceny Act, 1861, for defrauding the company, or concealing any fraud by falsification or destruction of books, accounts, etc.
- (8) Under § 20 of the Larceny Act, 1916, for fraudulent conversion of the property of the company.
- (9) Under the Solicitors Act, 1934, for any act done of such a nature or in such a manner as to be calculated to imply that the company is qualified, or recognised by law as qualified, to act as a solicitor.

(See also Appendix I.)

In *Rex v. Kylsant* ((1931), 48 T.L.R. 62) the chairman of the Royal Mail Steam Packet Co. was convicted under § 84 of the Larceny Act, 1861, of issuing a false prospectus inviting the public to subscribe for debenture stock of the company. The prospectus stated that "although this company....has suffered from the depression in the shipping industry, the audited accounts show that during the last ten years the average annual balance available (including profits of the insurance fund), after providing for depreciation and interest on existing debenture stocks, has been sufficient to pay the interest on the present issue more than five times over." There followed a statement of the dividends paid. The fact that the dividends were paid, not out of current earnings, but out of funds which had been earned in the abnormal war period and excessive (secret) reserves made in previous years was not stated in the prospectus. It was held that as the figures professed to disclose the existing position, but in fact concealed it, the prospectus was false in a material particular in that it conveyed a false impression.

§ 14 —Disclosure of Directors' Names.

Every company registered after 22nd November, 1916; every company incorporated outside Great Britain which establishes a place of business within Great Britain after 22nd November, 1916; and every company licensed under the Moneylenders Act, 1927, whenever it was registered or whenever it established a place of business, must in all trade catalogues, trade circulars, showcards and business letters on or in which the company's name appears and which are issued or sent by the company to any person in any part of His Majesty's dominions, state in legible characters with respect to every director being a corporation, the corporate name, and with respect to every director being an individual, the following particulars :—

- (a) his present christian name, or the initials thereof, and present surname;
- (b) any former christian names and surnames;
- (c) his nationality, if not British;
- (d) his nationality of origin, if his nationality is not the nationality of origin.

If, however, special circumstances exist which render it in the opinion of the Board of Trade expedient that such an exemption should be granted, the Board may by order grant, subject to such conditions as may be specified in the order, exemption from these obligations.

If a company makes default, every director of the company is liable on summary conviction for each offence to a fine not exceeding five pounds, and, in the case of a director being a corporation, every director, secretary and officer of the corporation, who

is knowingly a party to the default, is liable to a like penalty ; but in England no proceedings can be instituted except by, or with the consent of, the Board of Trade.

For these purposes—

- (a) the expression “director” includes any person in accordance with whose directions or instructions the directors of the company are accustomed to act ;
- (b) the expression “christian name” includes a forename ;
- (c) the expression “initials” includes a recognised abbreviation of a christian name ;
- (d) in the case of a peer or person usually known by a title different from his surname, the expression “surname” means that title ;
- (e) references to a former christian name or surname do not include—
 - (i) in the case of a peer or a person usually known by a British title different from his surname, the name by which he was known previous to the adoption of or succession to the title ; or
 - (ii) in the case of natural born British subjects, a former christian name or surname where that name or surname was changed or disused before the person bearing the name attained the age of eighteen years ; or
 - (iii) in the case of a married woman, the name or surname by which she was known previous to the marriage ;
- (f) the expression “showcards” means cards containing or exhibiting articles dealt with, or samples or representations thereof (§ 145).

Similar particulars as to directors must be included in the case of all companies :

- (1) In the annual return (§ 108).
- (2) In the return to the Registrar of Companies, to be made by a foreign company carrying on business in Great Britain (§ 344).
- (3) In the register of directors (§ 144).

SYNOPSIS OF CHAPTER XI.

BOOKS AND ACCOUNTS.

- § 1.—THE REGISTER OF MEMBERS.
 - (a) Trusts not to be entered.
 - (b) Inspection.
 - (c) Rectification of Register.
 - (d) Dominion Register.
- 2.—ANNUAL RETURN.
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- 3.—REGISTER OF DIRECTORS.
- 4.—REGISTER OF CHARGES.
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- 7.—BALANCE SHEET.
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- 9.—INVESTIGATION BY COMPANY'S INSPECTORS.

CHAPTER XI.

BOOKS AND ACCOUNTS.

§ 1.—The Register of Members.

Every company must keep in one or more books a register of its members, and enter therein the following particulars :—

- (a) The names and addresses, and the occupations, if any, of the members, and in the case of a company having a share capital a statement of the shares held by each member, distinguishing each share by its number, and of the amount paid or agreed to be considered as paid on the shares of each member ;
- (b) The date at which each person was entered in the register as a member ;
- (c) The date at which any person ceased to be a member.

Where, however, the company has converted any of its shares into stock and given notice of the conversion to the Registrar of Companies, the register must show the amount of stock held by each member instead of the amount and particulars relating to shares.

If default is made the company and every officer of the company who is in default is liable to a default fine, *i.e.*, a fine not exceeding £5 a day (§ 95).

Every company having more than fifty members must, unless the register of members is in such a form as to constitute in itself an index, keep an index of the names of the members of the company and within fourteen days after the date on which any alteration is made in the register of members, make any necessary alteration in the index.

The index, which may be in the form of a card index, must in respect of each member contain a sufficient indication to enable the account of that member in the register to be readily found.

If default is made, the company and every officer of the company who is in default is liable to a default fine (§ 96).

On the issue of a share warrant the company must strike out of its register of members the name of the member then entered therein as holding the shares specified in the warrant as if he had ceased to be a member, and enter in the register the following particulars :—

- (a) The fact of the issue of the warrant ;
- (b) A statement of the shares included in the warrant, distinguishing each share by its number ; and
- (c) The date of the issue of the warrant.

The bearer of a share warrant is, subject to the Articles of the company, entitled, on surrendering it for cancellation, to have his name entered as a member in the register of members.

The company is responsible for any loss incurred by any person by reason of the company entering in the register the name of a bearer of a share warrant in respect of the shares therein specified without the warrant being surrendered and cancelled.

Until the warrant is surrendered, the particulars specified above are deemed to be the particulars required to be entered in the register of members, and, on the surrender, the date of the surrender must be entered.

Subject to the provisions of the Act, the bearer of a share warrant may, if the Articles of the company so provide, be deemed to be a member of the company within the meaning of the Act, either to the full extent or for any purposes defined in the Articles (§ 97).

The register is *prima facie* evidence of any matters directed or authorised by the Acts to be inserted therein (§ 102).

(a) Trusts not to be entered.

No notice of any trust, expressed, implied, or constructive is allowed to be entered on the register, or be receivable by the Registrar, in the case of companies registered in England (§ 101).

In the case of a trust it is therefore imperative to register the trustees as joint owners, in their own names, since otherwise the *cestui qui trust*, if registered, would have control of the shares. A trustee, if registered, will, of course, be liable for calls. If the shares are registered in the name of a nominee, whilst the latter would be liable for calls, he is entitled to an indemnity from his principal for all calls paid, even if the calls exceed the amount of the property held by the nominee (*Hardoon v. Belilios* (1901), A.C. 118). In that case a broker's clerk held shares as nominee for his principal, the broker. The shares were valueless, and the broker claimed that he was only liable to the value of the shares; but it was held that he must indemnify the clerk for all calls paid.

When new trustees are appointed, the shares must be transferred to them by a proper instrument of transfer ; a vesting declaration is not enough (Trustee Act, 1925, § 40 (4) (c)).

If the company knows of a trust, it need not enquire as to whether trustees are within their powers in dealing with the shares (*Simpson v. Molson* (1895), A.C. 270).

The executors of a deceased person are entitled to have their names entered on the register without a statement as to their representative capacity (*T. H. Saunders & Co.* (1908), 1 Ch. 415), but until they take the shares into their own names they incur no liability in respect of them (*Buchan's case* (1879), 4 A.C. 549), the estate being directly liable.

The entry of the name of the Public Trustee in the books of a company does not constitute notice of a trust (Public Trustee Act, 1906, § 11 (5)).

Joint holders are entitled to have their names entered in whatever order they wish (*Burns v. Siemens Bros.* (1919), 1 Ch. 225). This is important where the first named only is entitled by the Articles to vote, and joint holders for that reason often split their holdings into blocks, the names appearing in a different order for each block, so that all can vote.

(b) Inspection.

The register of members, commencing from the date of the registration of the company, and the index of the names of members must be kept at the registered office of the company, and, except when the register is closed as below, must during business hours (subject to such reasonable restrictions as the company in general meeting may impose, so that not less than

two hours in each day be allowed for inspection) be open to the inspection of any member without charge and of any other person on payment of one shilling, or such less sum as the company may prescribe, for each inspection.

Any member or other person may require a copy of the register, or of any part thereof, on payment of sixpence, or such less sum as the company may prescribe, for every hundred words or fractional part thereof required to be copied. The company must cause any copy so required by any person to be sent to that person within a period of ten days commencing on the day next after the day on which the requirement is received by the company.

If inspection is refused or if any copy required is not sent within the proper period, the company and every officer of the company who is in default is liable in respect of each offence to a fine not exceeding two pounds, and further to a default fine of two pounds (*i.e.*, not exceeding two pounds a day).

In the case of any such refusal or default, the Court may by order compel an immediate inspection of the register and index or direct that the copies required shall be sent to the persons requiring them (§ 98). The fact that the object of the inspection is criminal to the company does not justify refusal of inspection (*Mutter v. Eastern and Midlands Railway* (1888), 38 Ch. D. 92).

A company may, on giving notice by advertisement in some newspaper circulating in the district in which the registered office of the company is situate, close the register of members for any time or times not exceeding in the whole thirty days in each year (§ 99).

The right to inspect and require copies ceases when the company is in liquidation (*Kent Coalfield Syndicate* (1898), 1 Q.B. 754), and is not available during the time the register is properly closed.

(c) Rectification of Register.

If the name of any person is, without sufficient cause, entered in or omitted from the register of members of a company; or default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member, the person aggrieved, or any member of the company, or the company, may apply to the Court for rectification of the register. The Court may either refuse the application, or may order rectification of the register, and payment by the company of any damages sustained by any party aggrieved.

On such an application the Court may decide any question relating to the title of any person who is a party to the application to have his name entered in or omitted from the register, whether the question arises between members or alleged members, or between members or alleged members on the one hand and the company on the other hand, and generally may decide any question necessary or expedient to be decided for rectification of the register.

The Court, when making an order for rectification of the register, must by its order direct notice of the rectification to be given to the Registrar (§ 100).

Rectification can be made whether the company is a going concern or in liquidation, but after liquidation it cannot be rectified on the ground of fraud (*Oakes v. Turquand* (1867), L.R. 2 H.L. 325) unless the applicant never had been a member (*Alabaster's Case* (1869), 7 Eq. 273).

Rectification has been ordered by the Court *inter alia*, where the registration of a transfer has been wrongfully refused (*Stranton Iron and Steel Co.* (1873), 16 Eq. 559), where shares have been improperly surrendered (*Bellerby v. Roland and Marwood's Steamship Co.* (1902), 2 Ch. 14), and where effect has been given to a forged transfer (*Bahia and San Francisco Railway Co.* (1868), 3 Q.B. 584). Where an application is made to the Court for rectification, and it appears that there is some question in dispute requiring investigation, the practice is for the Court not to make the order applied for, but to dismiss the summons or motion, leaving it open for the applicant to bring an action for the settlement of the dispute (*In re Greater Britain Products Development Corporation* (1924), 40 T.L.R. 488).

(d) Dominion Register.

A company having a share capital whose objects comprise the transaction of business in any part of His Majesty's dominions outside Great Britain, the Channel Islands, or the Isle of Man may cause to be kept in any such part of His Majesty's dominions in which it transacts business a branch register of members resident in that part (called a "dominion register").

The company must give to the Registrar of Companies notice of the situation of the office where any dominion register is kept and of any change in its situation, and if it is discontinued, of its discontinuance, within fourteen days of the opening of the office or of the change or discontinuance, as the case may be. If default is made the company and every officer of the company who is in default is liable to a default fine (*i.e.*, not exceeding £5 a day).

References to a colonial register occurring in any Articles registered before the commencement of the Act are construed as references to a dominion register (§ 103).

A dominion register is deemed to be part of the company's register of members (called "the principal register").

It must be kept in the same manner in which the principal register is required to be kept, except that the advertisement before closing the register must be inserted in some newspaper circulating in the district where the dominion register is kept, and that any competent Court in that part of His Majesty's dominions where the register is kept may exercise the same jurisdiction of rectifying the register as is exercisable by the Court, and that the offences of refusing inspection or copies of a dominion register, and of authorising or permitting the refusal may be prosecuted summarily before any tribunal, having summary criminal jurisdiction in that part of His Majesty's dominions.

The company must transmit to its registered office a copy of every entry in its dominion register as soon as may be after the entry is made, and cause to be kept at its registered office, duly entered up from time to time, a duplicate of its dominion register. Every such duplicate is for all purposes deemed to be part of the principal register. If default is made in maintaining this duplicate register, the company and every officer of the company who is in default is liable to a default fine.

Subject to the provisions with respect to the duplicate register, the shares registered in a dominion register must be distinguished from the shares registered in the principal register, and no transaction with

respect to any shares registered in a dominion register must during the continuance of that registration, be registered in any other register.

A company may discontinue to keep any dominion register, and thereupon all entries in that register must be transferred to some other dominion register kept by the company in the same part of His Majesty's dominions, or to the principal register.

Subject to the provisions of the Act, any company may, by its Articles, make such provisions as it may think fit respecting the keeping of dominion registers (§ 104).

An instrument of transfer of a share registered in a dominion register, other than such a register kept in Northern Ireland, is deemed to be a transfer of property situate out of the United Kingdom, and, unless executed in any part of the United Kingdom, is exempt from stamp duty chargeable in Great Britain (§ 105).

The Foreign Jurisdiction Act, 1890, has effect as if sections 103, 104 and 105 of the Act were included among the enactments which by virtue of § 5 of that Act may be applied by Order in Council to foreign countries in which for the time being His Majesty has jurisdiction.

His Majesty may by Order in Council direct that the said sections, including any enactments for the time being in force amending or substituted for those sections, shall extend, with or without any exceptions, adaptations or modifications specified in the Order, to any territories under His Majesty's protection to which those sections cannot be extended under the Foreign Jurisdiction Act, 1890, as amended by subsection (1) of this section.

His Majesty may by Order in Council revoke or vary any Order so made (§ 106).

If by virtue of the law in force in any part of His Majesty's dominions outside Great Britain (including any territory which is under His Majesty's protection or in respect of which a mandate under the League of Nations has been accepted by His Majesty), companies incorporated under that law have power to keep in Great Britain branch registers of their members resident in Great Britain, His Majesty may by Order in Council direct that the rights as to inspection and copies and the powers of the Court to rectify the register. shall, subject to any modifications and adaptations specified in the Order, apply to and in relation to any such branch registers kept in Great Britain as they apply to and in relation to the registers of companies within the meaning of the Act (§ 107).

§ 2.—Annual Return.

(1) COMPANIES HAVING A SHARE CAPITAL.

Every company having a share capital must once at least in every year make a return containing a list of all persons who, on the fourteenth day after the first or only ordinary general meeting in the year, are members of the company, and of all persons who have ceased to be members since the date of the last return or in the case of the first return, of the incorporation of the company.

The list must state the names, addresses, and occupations of all the past and present members therein mentioned, and the number of shares held by each of the existing members at the date of the return, specifying shares transferred since the date of the last return or, in the case of the first return, of the incorporation of the company by persons who are

still members and have ceased to be members respectively and the dates of registration of the transfers, and, if the names therein are not arranged in alphabetical order, must have annexed to it an index sufficient to enable the name of any person in the list to be readily found. Where, however, the company has converted any of its shares into stock and given notice of the conversion to the Registrar of Companies, the list must state the amount of stock held by each of the existing members instead of the amount of shares and the particulars relating to shares.

The return must also state the address of the registered office of the company and must contain a summary distinguishing between shares issued for cash and shares issued as fully or partly paid up otherwise than in cash, and specifying the following particulars :—

- (a) The amount of the share capital of the company, and the number of the shares into which it is divided.
- (b) The number of shares taken from the commencement of the company up to the date of the return.
- (c) The amount called up on each share.
- (d) The total amount of calls received.
- (e) The total amount of calls unpaid.
- (f) The total amount of the sums, if any, paid by way of commission in respect of any shares or debentures.
- (g) Particulars of the discount allowed on the issue of any shares issued at a discount, or of so much of that discount as has not been written off at the date on which the return is made.

- (h) The total amount of the sums, if any, allowed by way of discount in respect of any debentures, since the date of the last return.
- (i) The total number of shares forfeited.
- (k) The total amount of shares for which share warrants are outstanding at the date of the return.
- (l) The total amount of share warrants issued and surrendered respectively since the date of the last return.
- (m) The number of shares comprised in each share warrant.
- (n) All such particulars with respect to the persons who at the date of the return are the directors of the company as are required to be contained in the Register of Directors.
- (o) The total amount of indebtedness of the company in respect of all mortgages and charges which are required (or, in the case of a company registered in Scotland which, if the company had been registered in England, would be required) to be registered with the Registrar of Companies, or which would have been required so to be registered if created after 1st July, 1908.

The return must be in accordance with the form set out in the Sixth Schedule to the Act, or as near thereto as circumstances admit.

In the case of a company keeping a dominion register, the particulars of the entries in that register must so far as they relate to matters which are required to be stated in the return, be included in the return made next after copies of those entries are received at the registered office of the company (§ 108).

(2) COMPANIES NOT HAVING A SHARE CAPITAL

Every company not having a share capital must once at least in every calendar year make a return stating—

- (a) the address of the registered office of the company ;
- (b) all such particulars with respect to the persons who at the date of the return are the directors of the company as are required to be contained in the Register of Directors.

There must likewise be annexed to this return a statement containing particulars of the total amount of the indebtedness of the company in respect of all mortgages and charges which are required (or, in the case of a company registered in Scotland, which if the company had been registered in England, would be required) to be registered with the Registrar of Companies, or which would have been required so to be registered if created after 1st July, 1908 (§ 109).

The annual return must be contained in a separate part of the register of members, and must be completed within twenty-eight days after the first or ordinary general meeting in that year, and the company must forthwith forward to the Registrar of Companies a copy signed by a director or by the manager or by the secretary of the company. The annual return is open to inspection and copies can be obtained in the same manner as in connection with the register of members.

Except where the company is a private company, or is an assurance company which has sent a copy of its accounts and balance sheet to the Registrar in accordance with the provisions of § 7 (4) of the Assurance Companies Act, 1909, the annual return must include a written copy, certified by a director or the

manager or secretary of the company to be a true copy, of the last balance sheet which has been audited by the company's auditors, including every document required by law to be annexed thereto, together with a copy of the report of the auditors thereon certified as aforesaid, and if any such balance sheet is in a foreign language there must also be annexed to it a translation thereof in English, certified in the prescribed manner to be a correct translation. If, however, the last balance sheet did not comply with the requirements of the law as in force at the date of the audit with respect to the form of balance sheets there must be made such additions to and corrections in the copy as would have been required to be made in the balance sheet in order to make it comply with the said requirements, and the fact that the copy has been so amended must be stated thereon.

If a company fails to comply with any of the above requirements, the company and every officer of the company who is in default is liable to a default fine, i.e., a fine not exceeding £5 a day.

The expression "officer," and the expression "director," as used above, includes any person in accordance with whose directions or instructions the directors of the company are accustomed to act (§ 110).

The company must file the annual return once in every CALENDAR year (*Gibson v. Barton* (1875), L.R. 10 Q.B. 329); and this even if a general meeting is not held (*Park v. Lawton* (1911), 1 K.B. 588).

The Registrar of Companies considers that the expression "every document required to be annexed" to the balance sheet does not include a copy of the profit and loss account.

Private companies are required to comply with the Articles whereby they are constituted private

⁴ Total amount of calls received, including payments on application and allotment	} £ .
Total amount (if any) agreed to be considered as paid on shares which have been issued as fully paid up otherwise than in cash	} £ .
Total amount (if any) agreed to be considered as paid on shares which have been issued as partly paid up to the extent of .. per share otherwise than in cash	} £ .
Total amount of calls unpaid	£ .
Total amount of sums (if any) paid by way of commission in respect of any shares or debentures or allowed by way of discount in respect of any debentures since date of the last return	} £ .
Total number of shares forfeited	
Total amount paid (if any) on shares forfeited	£ .
Total amount of shares for which share warrants to bearer are outstanding	} £ .
Total amount of share warrants to bearer issued and surrendered respectively since date of the last return	} Issued Surrendered £ .
Number of shares comprised in each share warrant to bearer..	
Total amount of the indebtedness of the company in respect of all mortgages and charges of the kind which are required (or, in the case of a company registered in Scotland, which, if the company had been registered in England, would be required) to be registered with the Registrar of Companies, under the Companies Act, 1929	} £ .

¹ When there are shares of different kinds or amounts (e.g., Preference and Ordinary or £1 and 1s) state the number and nominal values separately.

² If the shares are of different kinds, state them separately.

³ Where various amounts have been called or there are shares of different kinds, state them separately.

⁴ Include what has been received on forfeited as well as on existing shares.

COPY OF LAST AUDITED BALANCE SHEET OF THE COMPANY.

NOTE.—Except where the company is (1) a "Private Company" within the meaning of Section 26 of the Companies Act, 1929, or is (2) an assurance company which has complied with the provisions of Section 7 (4) of the Assurance Companies Act, 1909, this return must include a written copy, certified by a director or by the manager or secretary of the company to be a true copy, of the last balance sheet which has been audited by the company's auditors (including every document required by law to be annexed thereto) together with a copy of the report of the auditors thereon (certified as aforesaid), and if any such balance sheet is in a foreign language there must also be annexed to it a translation thereof in English certified in the prescribed manner to be a correct translation. If the said last balance sheet did not comply with the requirements of the law as in force at the date of the audit with respect to the form of balance sheets there must be made such additions to and corrections in the said copy as would have been required to be made in the said balance sheet in order to make it comply with the said requirements, and the fact that the said copy has been so amended must be stated thereon.

PRIVATE COMPANY

Certificates to be given by a Private Company

A "I certify that the company has not since the date of the last Annual Return issued any invitation to the public to subscribe for any shares or debentures of the company

(Signature)

(State whether Director or Secretary)

B Should the number of members of the company exceed fifty the following certificate is also required —

I certify that the excess of members of the company above fifty consists wholly of persons who are in the employment of the company and/or of persons who having been formerly in the employment of the company were while in such employment and have continued after the determination of such employment to be members of the company'

(Signature)

(State whether Director or Secretary)

¹ In the case of the first Annual Return strike out the words 'last Annual Return' and substitute therefor the words 'Incorporation of the Company'

NOTE — Banking companies must add a list of all their places of business

The Return must be signed at the end by a director or by the manager or secretary of the company

Delivered for filing by

Particulars of the *Directors of the _____ Company
Limited at the date of the Annual Return

†The present Christian Name or Name and Surname	Any former Christian Name or Name or Surname	Nationality	Nationality of origin if other than the present nationality)	I usual residential address	‡Other business occupation if any. If none state so
---	--	-------------	---	-----------------------------------	---

* Director includes any person who occupies the position of a director by whatever name called and any person in accordance with whose directions or instructions the directors of a company are accustomed to act

† In the case of a corporation its corporate name and registered or principal office should be shown

‡ In the case of an individual who has no business occupation but holds any other directorship or directorships particulars of that directorship or of some one of those directorships must be entered

LIST OF PERSONS holding shares in the _____ Company Limited,
on the _____ day of _____ 19____, and of Persons who have held
shares therein at any time since the date of the last return or, (in
the case of the first return) of the incorporation of the company,
showing their names and addresses and an account of the shares so
held

N B—If the names in this list are not arranged in alphabetical order,
an index sufficient to enable the name of any person in the list to be readily
found must be annexed to this list

NAMES, ADDRESSES, AND OCCUPATIONS					ACCOUNT OF SHARES				Remarks	
Folio in Register Letter containing Particulars	Surname	Christian Name	Address	Occupation	* Number of Shares held by existing Members at date of Return	† Particulars of Shares transferred since the Date of the last Return or (in the case of the first Return) of the incorporation of the Company by persons who are still Members		‡ Particulars of Shares transferred since the date of the last Return or (in the case of the first Return) of the incorporation of the Company by Persons who have ceased to be Members		
						Number †	Date of Registration of Transfer	Number †	Date of Registration of Transfer	

(Signature)
(State whether Director or Manager or Secretary)

* The aggregate number of shares held and not the distinctive numbers must be stated, and the column must be added up throughout so as to make our total to agree with that stated in the summary to have been taken up

† When the shares are of different classes these columns may be subdivided so that the number of each class held or transferred may be shown separately. Where any shares have been converted into stock the amount of stock held by each member must be shown

‡ The date of registration of each transfer should be given as well as the number of shares transferred on each date. The particulars should be placed opposite the name of the transferor and not opposite that of the transferee but the name of the transferee may be inserted in the Remarks column immediately opposite the particulars of each transfer

§ 3.—Register of Directors.

A register containing the names, addresses, and occupations of the directors and managers, must be kept, and a copy thereof must be sent to the Registrar, who must also be notified of any change. The

penalty for failure is £5 a day on the company and any director, manager, secretary or other officer, authorising the default (§ 144). (*See* Chap. X, § 7.)

For at least two hours on each day, the register must be open for the inspection of any member of the company without charge, and of other persons at a charge not exceeding one shilling. If inspection is refused, the company and every officer of the company who is in default is liable to a fine of £5, and upon application, the Court may order an immediate inspection of the register (§ 144).

§ 4.—Register of Charges.

A register of charges specifically affecting property of the company must be kept, giving a short description of the property charged, the amount of the mortgage or charge, and (except in the case of securities to bearer) the names of the mortgagees or persons entitled to the charge.

The penalty for wilful omission is a sum not exceeding £50 on every director, manager, or other officer authorising the same (§ 88). (*See* Chap IX, § 3.)

The register, and copies of any instruments creating any charge requiring registration, must, for at least two hours a day, be open to the inspection of members and creditors of the company without charge, and of other persons upon payment of a sum not exceeding one shilling. If inspection of the said copies or the register is refused, any officer of the company who is in default is liable to a fine not exceeding £5, and to a further fine not exceeding £2 a day during which the default continues. The Court may order an immediate inspection of the copies or register (§ 89).

§ 5.—Minute Books.

Minute books of proceedings at general meetings, or at meetings of the directors or managers, must be kept.

Any minute duly signed is evidence of proceedings at the meeting concerned ; and until the contrary is proved, every general meeting of the company, or meeting of directors or managers, in respect of the proceedings whereof minutes have been so made, is deemed to have been duly held and convened, and all proceedings had thereat to have been duly had, and all appointments of directors, managers or liquidators, are deemed to be valid (§ 120).

Books containing the MINUTES OF PROCEEDINGS OF GENERAL MEETINGS of the company must be kept at the registered office of the company, and during business hours (subject to such reasonable restrictions as the Articles or a general meeting impose so that not less than two hours a day are allowed for inspection) be open to the inspection of any member without charge. Any member can require a copy of any such minutes to be furnished to him within seven days after request, at a charge not exceeding sixpence for every 100 words. If inspection, or the supply of required copies, is refused, the company and every officer of the company who is in default is liable to a fine not exceeding £2 for each offence, and further to a default fine not exceeding £2 a day. The Court may compel an immediate inspection of the minute book, or direct the supply of required copies to the persons who have applied for them (§ 121). There is no such right of inspection, or to obtain copies, of minutes of directors' meetings.

§ 6.—Accounts.

Every company must cause to be kept proper books of account with respect to—

- (a) all sums of money received and expended by the company and the matters in respect of which the receipt and expenditure takes place ;
- (b) all sales and purchases of goods by the company ;
- (c) the assets and liabilities of the company.

The books of account must be kept at the registered office of the company or at such other place as the directors think fit, and at all times be open to inspection by the directors.

If a director fails to take all reasonable steps to secure compliance by the company with these requirements or has by his own wilful act been the cause of any default, he is, in respect of each offence, liable on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding two hundred pounds, but a person must not be sentenced to imprisonment for such an offence unless, in the opinion of the Court dealing with the case, the offence was committed wilfully (§ 122).

Although § 122 does not mention stock sheets, it should be noted that by § 274, in a winding-up, directors and officers are liable on conviction to imprisonment if proper books of account were not kept within the period of two years immediately preceding the commencement of the winding-up.

For the purposes of that section, proper books of account are deemed not to have been kept in the case of any company if there have not been kept such

books or accounts as are necessary to exhibit and explain the transactions and financial position of the trade or business of the company, including books containing entries from day to day in sufficient detail of all cash received and cash paid, and, where the trade or business has involved dealings in goods, STATEMENTS OF THE ANNUAL STOCKTAKINGS and (except in the case of goods sold by way of ordinary retail trade) of all goods sold and purchased, showing the goods and THE BUYERS AND SELLERS thereof in sufficient detail to enable those goods and those buyers and sellers to be identified (§ 274 (2)).

The directors must at some date not later than eighteen months after the incorporation of the company and subsequently once at least in every calendar year lay before the company in general meeting a profit and loss account or, in the case of a company not trading for profit, an income and expenditure account for the period, in the case of the first account, since the incorporation of the company, and, in any other case, since the preceding account, made up to a date not earlier than the date of the meeting by more than nine months, or, in the case of a company carrying on business or having interests abroad, by more than twelve months. The Board of Trade, if for any special reason they think fit so to do, may, in the case of any company, extend the period of eighteen months, and in the case of any company and with respect to any year extend the periods of nine and twelve months aforesaid.

The directors must also cause to be made out in every calendar year, and to be laid before the company in general meeting, a balance sheet as at the date to which the profit and loss account, or the income

and expenditure account, as the case may be, is made up, and there must be attached to every such balance sheet :

- (i) a report by the directors with respect to the state of the company's affairs ;
- (ii) the amount, if any, which they recommend should be paid by way of dividend ; and
- (iii) the amount, if any, which they propose to carry to the reserve fund, general reserve or reserve account shown specifically on the balance sheet, or to a reserve fund, general reserve or reserve account to be shown specifically on a subsequent balance sheet.

If any director fails to take all reasonable steps to comply with these provisions, he is, in respect of each offence, liable on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding two hundred pounds, but a person must not be sentenced to imprisonment for such an offence unless in the opinion of the Court dealing with the case, the offence was committed wilfully (§ 123).

§ 7.—Balance Sheet.

Since the submission of a balance sheet to the annual general meeting is compulsory, the Act makes certain detailed provisions as to the information to be stated therein, although no actual form of balance sheet is prescribed so long as those provisions are complied with. There are also certain provisions which must be observed as to information to be disclosed in the "accounts," i.e., it would be permissible to disclose it either in the balance sheet or in the profit and loss account, or by way of a note on one of those documents.

The **BALANCE SHEET** must contain a summary of the authorised and issued share capital of the company, its liabilities and assets, together with such particulars as are necessary to disclose the general nature of such assets and liabilities, distinguishing between the amounts respectively of the fixed and the floating assets, and must also state how the values of the fixed assets have been arrived at (§ 124 (1)).

Under separate headings in the **BALANCE SHEET** must be stated (so far as they are not written off) :—

- (1) the preliminary expenses ;
- (2) expenses incurred in connection with any issue of share capital or debentures ;
- (3) the amount of the goodwill and of any patents or trade marks, if such items are shown separately or are ascertainable from the books of the company, from any contract for the sale or purchase of any property acquired by the company, or from any documents in the possession of the company relating to the stamp duty payable in respect of such contract or the conveyance of such property (§ 124 (2)) ;
- (4) particulars of the discount allowed upon the issue of shares (§ 47) ;
- (5) commission paid in respect of any shares or debentures or discount allowed in respect of any debentures (§ 44).

Where a company has power to re-issue debentures which have been redeemed, the **BALANCE SHEET** must disclose particulars with respect to the debentures which can be so re-issued (§ 75).

The **BALANCE SHEET** must also include under separate headings, the aggregate amount of any outstanding

loans made under the authority of the following provisions of § 45—

- (1) money provided by the company in accordance with any scheme for the time being in force for the purchase by trustees of fully-paid shares in the company to be held by or for the benefit of employees including any director holding a salaried employment or office ; and
- (2) loans made by the company to persons other than directors *bonâ fide* in the employment of the company with a view to enabling those persons to purchase fully-paid shares in the company to be held by themselves by way of beneficial ownership (§ 45).

Where the company has issued redeemable preference shares, the BALANCE SHEET must contain a statement specifying what part of the issued capital consists of redeemable preference shares, and the date on or before which those shares are, or are to be liable, to be redeemed (§ 46).

Where any liability of the company is secured otherwise than by operation of law on any assets of the company, the BALANCE SHEET must include a statement that that liability is so secured, but it is not necessary to specify the particular assets on which the liability is secured (§ 124 (3)). An example of a liability secured by operation of law is a vendor's lien for the unpaid purchase price of property. The secured liabilities referred to are such as arise from agreement between the parties.

Where the company has issued shares on which interest is payable out of capital under § 54 (*see* Chap. XII, § 1), the ACCOUNTS must show the share

capital on which, and the rate at which, interest has been paid out of capital during the period to which the accounts relate (§ 54 (1) (g)).

The ACCOUNTS laid before the company in general meeting must contain particulars showing—

- (a) the amount of any loans which during the period to which the accounts relate have been made either by the company or by any other person under a guarantee from or on a security provided by the company to any director or officer of the company, including any such loans which were repaid during the said period ; and
- (b) the amount of any loans made in manner aforesaid to any director or officer at any time before the period aforesaid and outstanding at the expiration thereof ; and
- (c) the total of the amount paid to the directors as remuneration for their services, inclusive of all fees, percentages, or other emoluments, paid to or receivable by them by or from the company or by or from any subsidiary company.

The provisions with respect to loans do not apply—

- (a) in the case of a company the ordinary business of which includes the lending of money, to a loan made by the company in the ordinary course of its business ; or
- (b) to a loan made by the company to any employee of the company if the loan does not exceed two thousand pounds and is certified by the directors of the company to have been made in accordance with any practice

adopted or about to be adopted by the company with respect to loans to its employees.

If the above requirements are not complied with, it is the duty of the auditors of the company by whom the accounts are examined to include in their report on the balance sheet of the company, so far as they are reasonably able to do so, a statement giving the required particulars.

The provisions with respect to the remuneration paid to directors do not apply in relation to a **MANAGING DIRECTOR OF THE COMPANY**, and in the case of any other **DIRECTOR WHO HOLDS ANY SALARIED EMPLOYMENT OR OFFICE** in the company there is not required to be included in the said total amount any sums paid to him except sums paid by way of directors' fees (§ 128). In the case of a director of the holding company who is managing director of a subsidiary, his fees in both capacities would have to be included in the statement of director's fees, whereas in the case of a managing director of the holding company, no fees need be disclosed, even if received from a subsidiary company of which he was managing director.

The expression "emoluments" includes fees, percentages and other payments made or consideration given, directly or indirectly, to a director as such, and the money value of any allowances or perquisites belonging to his office (§ 128).

There is no definition in the Act of a **HOLDING COMPANY**, except indirectly as follows :—

Where the assets of a company consist in whole or in part of shares in another company, whether held directly or through a nominee and whether

that other company is a company within the meaning of the Act or not, and—

- (a) the amount of the shares so held is at the time when the accounts of the holding company are made up more than fifty per cent. of the issued share capital of that other company or such as to entitle the company to more than fifty per cent. of the voting power in that other company ; or
- (b) the company has power (not being power vested in it by virtue only of the provisions of a debenture trust deed or by virtue of shares issued to it for the purpose in pursuance of those provisions) directly or indirectly to appoint the majority of the directors of that other company,

that other company shall be deemed to be a subsidiary company within the meaning of the Act, and the expression “subsidiary company” in the Act means a company in the case of which the conditions of this section are satisfied.

Where a company the ordinary business of which includes the lending of money holds shares in another company as security only, no account is, for the purpose of determining whether that other company is a subsidiary company, to be taken of the shares so held (§ 127).

Where any of the assets of a company consist of shares in, or amounts owing (whether on account of a loan or otherwise) from a subsidiary company or subsidiary companies, the aggregate amount of those assets, distinguishing shares and indebtedness, must be set out in the **BALANCE SHEET** of the first-mentioned company (the holding company) separately from all

its other assets, and where a company is indebted, whether on account of a loan or otherwise, to a subsidiary company or subsidiary companies, the aggregate amount of that indebtedness must be set out in the balance sheet of that company separately from all its other liabilities (§ 125).

Where the holding company holds shares either directly or through a nominee in a subsidiary company or in two or more subsidiary companies, there must be ANNEXED TO THE BALANCE SHEET of the holding company a statement signed by the persons, *i.e.*, two directors or the sole director, by whom in pursuance of § 129 the balance sheet is signed, stating how the profits and losses of the subsidiary company, or where there are two or more subsidiary companies, the aggregate profits and losses of those companies, have, so far as they concern the holding company, been dealt with in, or for the purposes of, the accounts of the holding company, and in particular how, and to what extent—

- (a) provision has been made for the losses of a subsidiary company either in the accounts of that company or of the holding company, or of both ; and
- (b) losses of a subsidiary company have been taken into account by the directors of the holding company in arriving at the profits and losses of the holding company as disclosed in its accounts.

It is not necessary however, to specify in any such statement the actual amount of the profits or losses of any subsidiary company, or the actual amount of any part of any such profits or losses which has been dealt with in any particular manner.

If in the case of a subsidiary company the auditors' report on the balance sheet of the company does not

state without qualification that the auditors have obtained all the information and explanations they have required and that the balance sheet is properly drawn up so as to exhibit a true and correct view of the state of the company's affairs according to the best of their information and the explanations given to them and as shown by the books of the company, the statement which is to be annexed as aforesaid to the balance sheet of the holding company must contain particulars of the manner in which the report is qualified.

For these purposes, the profits or losses of a subsidiary company mean the profits or losses shown in any accounts of the subsidiary company made up to a date within the period to which the accounts of the holding company relate, or, if there are no such accounts of the subsidiary company available at the time when the accounts of the holding company are made up, the profits or losses shown in the last previous accounts of the subsidiary company which became available within that period.

If for any reason the directors of the holding company are unable to obtain such information as is necessary for the preparation of the statement aforesaid, the directors who sign the balance sheet must so report in writing and their report be annexed to the balance sheet in lieu of the statement (§ 126).

Every balance sheet of a company must be signed by two directors, or if there is only one director, by that director, and the auditors' report must be attached to the balance sheet (§ 129).

If any copy of a balance sheet which has not been signed as required by the directors is issued, circulated or published, or if any copy of a balance

sheet is issued, circulated or published without having a copy of the auditors' report attached thereto, the company, and every director, manager, secretary or other officer of the company who is knowingly a party to the default will on conviction be liable to a fine not exceeding £50 (§ 129).

In the case of a banking company registered after the 15th August, 1879, the balance sheet must be signed by the secretary or manager (if any), and where there are more than three directors of the company, by at least three of those directors, and where there are not more than three directors by all the directors (§ 129).

Except in the case of a private company, a copy of every balance sheet, including every document required by law to be annexed thereto, and a copy of the auditors' report, must, not less than seven days before the date of the meeting at which such balance sheet is to be submitted, be sent to all persons entitled to receive notices of general meetings of the company. Any member, whether he is or is not entitled to have sent to him copies of the company's balance sheets, and any debenture holder can claim to be furnished on demand and without charge, with a copy of the last balance sheet of the company, including every document required by law to be annexed thereto, together with a copy of the auditors' report. If default is made in sending copies of the balance sheet to persons entitled to receive notices of meetings the company and every officer of the company who is in default, is liable to a fine not exceeding £20, and if copies are not sent in compliance with a demand by those persons entitled to make such request, within seven days after such demand is made,

the company, and every director, manager, secretary or other officer who is knowingly a party to the default is liable to a fine of £5 a day, unless it is proved that the person making the demand has already demanded and been furnished with a copy.

In the case of private companies, any member is entitled to be furnished, within seven days after request, with a copy of the balance sheet and auditors' report at a charge not exceeding sixpence for every 100 words. The penalty upon default is a fine not exceeding £5 a day during which the default continues, upon the company and every officer in default (§ 130).

§ 8.—Investigation by Board of Trade Inspectors.

The Board of Trade may appoint one or more competent inspectors to investigate the affairs of a company and to report thereon in such manner as the Board direct—

- (a) In the case of a banking company having a share capital, on the application of members holding not less than one-third of the shares issued ;
- (b) In the case of any other company having a share capital, on the application of members holding not less than one-tenth of the shares issued ;
- (c) In the case of a company not having a share capital, on the application of not less than one-fifth in number of the persons on the company's register of members.

The application must be supported by such evidence as the Board of Trade may require for the purpose of

showing that the applicants have good reason for, and are not actuated by malicious motives in, requiring the investigation, and the Board of Trade may, before appointing an inspector, require the applicants to give security, to an amount not exceeding one hundred pounds, for payment of the costs of the inquiry.

It is the duty of all officers and agents of the company to produce to the inspectors all books and documents in their custody or power.

An inspector may examine on oath the officers and agents of the company in relation to its business, and may administer an oath accordingly.

If any officer or agent of the company refuses to produce to the inspectors any book or document which it is his duty under this section so to produce, or refuses to answer any question which is put to him by the inspectors with respect to the affairs of the company, the inspectors may certify the refusal under their hand to the Court, and the Court may thereupon enquire into the case, and after hearing any witnesses who may be produced against or on behalf of the alleged offender, and after hearing any statement which may be offered in defence, punish the offender in like manner as if he had been guilty of contempt of the Court.

On the conclusion of the investigation the inspectors must report their opinion to the Board of Trade, and a copy of the report must be forwarded by the Board to the registered office of the company, and a further copy must, at the request of the applicants for the investigation, be delivered to them.

The report must be written or printed, as the Board direct (§ 135).

If from any such report it appears to the Board of Trade that any person has been guilty of any offence in relation to the company for which he is criminally liable the Board must proceed as follows :—

- (i) in the case of an offence in England, if it appears to the Board that the case is one in which the prosecution ought to be undertaken by the Director of Public Prosecutions, the Board must refer the matter to him ;
- (ii) in the case of an offence in Scotland the Board must refer the matter to the Lord Advocate.

If where any matter is so referred to the Director of Public Prosecutions he considers that the case is one in which a prosecution ought to be instituted and, further, that it is desirable in the public interest that the proceedings in the prosecution should be conducted by him, he must institute proceedings accordingly, and it will be the duty of all officers and agents of the company, past and present (other than the defendant in the proceedings), to give to him all assistance in connection with the prosecution which they are reasonably able to give. The expression “agents” in relation to a company is here deemed to include the bankers and solicitors of the company and any persons employed by the company as auditors, whether those persons are or are not officers of the company.

The expenses of and incidental to such an investigation must be defrayed as follows :—

- (a) Where as a result of the investigation a prosecution is instituted by the Director of Public Prosecutions or by or on behalf of the Lord Advocate, the expenses are to be defrayed by the Board of Trade.

- (b) In any other case the expenses are to be defrayed by the company unless the Board of Trade think proper to direct, as the Board are authorised to do, that they shall either be paid by the applicants, or in part by the company and in part by the applicants.

If, however, the company fails to pay the whole or any part of the sum which it is liable to pay, the applicants must make good the deficiency up to the amount by which the security given by them exceeds the amount, if any, which they have been directed by the Board to pay; and any balance of the expenses not defrayed either by the company or the applicants must be defrayed by the Board.

Section 13 (3) of the Economy (Miscellaneous Provisions) Act, 1926 (which provides for the issue out of the Bankruptcy and Companies Winding-up (Fees) Account of sums towards meeting the charges estimated by the Board of Trade in respect of salaries and expenses in relation to the winding-up of companies in England) have effect as if expenses to be defrayed by the Board were expenses incurred by the Board in relation to the winding-up of companies in England (§ 136).

§ 9.—Investigation by Company's Inspectors.

A company may BY SPECIAL RESOLUTION appoint inspectors to investigate its affairs.

Inspectors so appointed have the same powers and duties as inspectors appointed by the Board of Trade, except that, instead of reporting to the Board, they must report in such manner and to such persons as the company in general meeting may direct.

If any officer or agent of the company refuses to produce to the inspectors any book or document which it is his duty to produce, or refuses to answer any question which is put to him by the inspectors with respect to the affairs of the company, he is liable to be proceeded against in the same manner as if the inspectors had been inspectors appointed by the Board of Trade (§ 137).

A copy of the reports of any inspectors appointed under the Act, authenticated by the seal of the company whose affairs they have investigated, will be admissible in any legal proceedings as evidence of the opinion of the inspectors in relation to any matter contained in the report (§ 138).

Inspectors appointed by a company otherwise than as above have no statutory rights, *e.g.*, an appointment of inspectors at a general meeting by ordinary or extraordinary resolution would give the inspectors no powers to demand inspection of the books, etc., of the company.

SYNOPSIS OF CHAPTER XII.

DIVISIBLE PROFITS AND DIVIDENDS.

§ 1.—PAYMENT OF INTEREST OUT OF CAPITAL.

2.—PROFITS.

3.—DIVISIBLE PROFITS.

4.—CAPITAL PROFITS.

5.—DIVIDENDS.

6.—BONUSES.

CHAPTER XII.

DIVISIBLE PROFITS AND DIVIDENDS.

§ 1.—Payment of Interest out of Capital.

The return to shareholders in respect of their shares takes the form of a dividend out of the profits earned, and such a dividend can only be paid if there are profits available for that purpose.

Where, however, any SHARES of a company are ISSUED FOR the purpose of RAISING MONEY TO DEFRAY the expenses of the CONSTRUCTION OF any WORKS or buildings or the PROVISION OF any PLANT which cannot be made profitable for a lengthened period, the company may pay interest on so much of that share capital as is for the time being paid up for the period and subject to the conditions and restrictions mentioned below, and may charge the sum so paid by way of interest to capital as part of the cost of construction of the work or building or the provision of plant (§ 54).

The CONDITIONS are as follows :—

- (a) No such payment shall be made unless it is authorised by the Articles or by special resolution.
- (b) No such payment, whether authorised by the Articles or by special resolution, shall be made without the previous sanction of the Board of Trade.

- (c) Before sanctioning any such payment the Board of Trade may, at the expense of the company, appoint a person to inquire and report to them as to the circumstances of the case, and may, before making the appointment, require the company to give security for the payment of the costs of the inquiry.
- (d) The payment shall be made only for such period as may be determined by the Board of Trade, and that period shall in no case extend beyond the close of the half year next after the half year during which the works or buildings have been actually completed or the plant provided.
- (e) The rate of interest shall in no case exceed four per cent. per annum or such other rate as may for the time being be prescribed by Order in Council. By the Companies (Interest out of Capital) Order, 1929, the maximum rate was raised to, and remains, six per cent.
- (f) The payment of the interest shall not operate as a reduction of the amount paid up on the shares in respect of which it is paid.
- (g) The accounts of the company shall show the share capital on which, and the rate at which, interest has been paid out of capital during the period to which the accounts relate. If default is made in complying with this proviso the company and every officer of the company who is in default is liable to a fine not exceeding fifty pounds.
- (h) Nothing in this section affects any company to which the Indian Railways Act, 1894 (which contains similar provisions), as amended by any subsequent enactment, applies. (§ 54.)

It must be borne in mind that the above restrictions apply only to interest on share capital. A creditor of a company is entitled to demand satisfaction of his claim for interest as well as principal out of whatever assets are available whether they represent capital or profits of the company.

Moreover, interest on moneys paid in advance of calls can be paid out of capital (*Lock v. Queensland Investment and Mortgage Co.* (1896), A.C. 461).

§ 2.—Profits.

It is a principle of law that dividends must not be paid out of capital, and this principle is usually reflected by provision in the Articles of Association that dividends may be paid only out of profits; it is necessary therefore to see what is meant by the term “profits.”

If the total net assets of a business at two dates be compared, the increase which they show at the later date as compared with the earlier date (due allowance, of course, being made for any capital introduced into or taken out of the business in the meanwhile) represents in strictness the profits of the business during the period in question (*Spanish Prospecting Co.* (1911), 1 Ch. 92).

But it is usual in practice, when drawing up accounts, to ignore unrealised gains not arising from carrying on the business, *e.g.*, a rise in the value of land owned and occupied by the business; and depreciation of assets is generally calculated according to an arbitrary rule.

Where, however, the rights of outsiders intervene, *e.g.*, where it is necessary to calculate a commission on profits to a manager, the term “profits” means

actual profits (*Spanish Prospecting Co.*, *supra*), and not necessarily the profits shown by the profit and loss account. Thus, for this purpose, the term would include capital profits and profits not arising in the ordinary course of trade (subject, of course, to the terms of the agreement with the manager).

§ 3.—Divisible Profits.

The profits which are divisible amongst the members in the case of a limited company depend to a very large extent on the circumstances of each particular case. Subject to the Memorandum and Articles of Association the divisible profits of a company may be said to be :—

- (1) The excess of current income over current expenditure after making good depreciation of floating assets and retaining sufficient funds to pay liabilities, but without necessarily in all cases taking into account depreciation of fixed assets.
- (2) Capital profits may be divisible if they are realised and a surplus remains after making good any capital losses, and if it is within the powers of the company to distribute such capital profits.
- (3) Revenue losses must be made good before profits can be distributed, and capital losses must be made good before capital profits can be distributed ; but capital losses need not necessarily be made good before revenue profits are distributed.

It is not, however, necessarily illegal in every case for dividends to be paid out of current profits without making good existing deficiencies in paid-up

capital, or without writing off a debit on the company's profit and loss account occasioned by loss in previous years (*Ammonia Soda Company v. Chamberlain and Others* (1918), 1 Ch. 266 ; *Stapley v. Read Bros.* (1924), 2 Ch. 1).

Dividends cannot be paid out of capital, even though the Memorandum or Articles purport to give power to do so (*Verner v. General Commercial Investment Trust* (1894), 2 Ch. 264 ; *re Sharpe* (1892), 1 Ch. 154), for this would amount to a reduction of capital and a reduction can legitimately be effected only in the manner prescribed by the Act (*Trevor v. Whitworth* (1887), 12 A.C. 409 ; *Guinness v. Land Corporation of Ireland* (1883), 22 Ch. D. 349).

In determining whether profits are available for the purpose of payment of a dividend it is necessary to see that the capital is intact, but there is sometimes a difference in this respect between fixed and circulating capital. Thus, in *Verner v. General Commercial Investment Trust* ((1894), 2 Ch. 264), Lindley, J., stated that "Fixed capital may be sunk and lost, and yet the excess of current receipts over current payments may be divided ; but floating or circulating capital must be kept up, as otherwise it will enter into and form part of such excess, in which case, to divide such excess without deducting the capital which forms part of it, will be contrary to law."

It has been said that a series of decisions (*Lee v. Neuchatel Asphalte Co.* (1889), 41 Ch. D. 1 ; *Verner v. General Commercial Investment Trust* (1894), 2 Ch. 264 ; *Wilmer v. McNamara* (1895), 2 Ch. 245) have established a rule that a loss of fixed capital need not be made good before the ascertainment of divisible profits. Doubt was thrown on the accuracy of this proposition by the House of Lords in *Dovey v. Cory* ((1901),

A.C. 477), although they gave no actual decision on this point, and, shortly afterwards, in *Bond v. Barrow Hæmatite Steel Co.* ((1902), 1 Ch. 358), Farwell, J., expressed the opinion that the proper course is to make good any such realised loss before declaring a dividend.

The Court of Appeal however, in *Ammonia Soda Co. v. Chamberlain* ((1918), 1 Ch. 266), reverted to the proposition laid down in the cases decided prior to *Dovey v. Cory* (*supra*), that it is not necessarily illegal for directors of a limited company to pay dividends out of current profits without making good existing deficiencies in the paid-up capital even though such deficiencies were represented by a debit balance on profit and loss account occasioned by losses in previous years.

In any case a current loss in respect of floating capital must be made good before dividends are declared (*Verner v. General Commercial Investment Trust, supra*); but it is important to remember that it may be difficult to determine what is fixed capital and what is floating capital. In *Bond v. Barrow Hæmatite Steel Co.* (*supra*), Farwell, J., held that a mine, blast furnace, and cottages, which had been acquired for shares, represented circulating capital, because the mine had been acquired to supply the company with ore for use in its own works; though there can be little doubt that they were fixed assets, and would be regarded commercially as representing fixed capital.

Apart from the requirements of the law on the subject, it is always prudent commercially to provide for depreciation on ALL assets before the ascertainment of profits, and to keep the whole capital, without economic distinction, intact.

The remarks of Swinfen Eady, J. (*Re Crabtree* (1912), 106 L.T. 49), may usefully be noted in this respect : "In the ordinary course of ascertaining the profits of a business where there is power machinery and trade machinery which is necessary in order to perform the work of the business, it is, in my opinion, essential that, in addition to all sums actually expended in repairing the machinery, or in renewing parts, there should be also written off a proper sum for depreciation, and that sum ought to be written off before you can arrive at the profits of the business ; and it is not profit until a proper sum, varying with the class of machinery, with the nature of the business, and with the life of the machinery, has been written off for depreciation." In that case, however, the point at issue was the amount of profit available for the life tenant of an estate, where the testator had directed his trustees to carry on his business and pay the profits thereof to his wife during her lifetime, and the position must be distinguished from that of a company of which one of the objects is the holding of wasting assets.

If depreciation has been written off, but no depreciation, or less depreciation than the amount written off, has occurred, such excess depreciation can be written back (*Ammonia Soda Co. v. Chamberlain*, *supra* ; *Stapley v. Read Bros.* (1924), 1 Ch. 1).

Where a company had formed a reserve fund partly out of the premiums received on the issue of shares at a price in excess of their par value it was held that the company could validly employ that fund in the payment of dividends on certain preference shares (*Drown v. Gaumont-British Picture Corporation Ltd.* (1937), Ch. 402).

§ 4.—Capital Profits.

Capital profits may be available for distribution in dividend if the regulations of the company permit. Thus, where part of a company's undertaking was sold for a sum greater than the paid-up capital of the company, it was legal to distribute the surplus to the shareholders (*Lubbock v. British Bank of South America* (1892), 2 Ch. 198).

It must, however, be ascertained that the capital fund is intact before the capital surplus is distributed, and for this purpose a *bonâ fide* valuation of the assets and liabilities of the whole undertaking must be made (*Foster v. New Trinidad Lake Asphalt Co.* (1901), 1 Ch. 208).

A capital surplus will therefore only be available for distribution if—

- (i) the regulations of the particular company authorise it;
- (ii) it is actually realised in cash, or (*semble*) is readily realisable, and
- (iii) it is ascertained by valuation of the assets and liabilities that it forms no part of the actual capital.

“When it is said that dividends cannot be paid out of capital the word ‘capital’ means the money subscribed pursuant to the Memorandum of Association or what is represented by that money. Accretions to that capital may be realised and turned into money which may be divided amongst the shareholders, as was decided in *Lubbock v. British Bank of S. America.*” (Lindley, J., in *Verner v. General Commercial Investment Trust*, *supra.*)

If assets (*e.g.*, goodwill) have been entirely written off out of past profits or written down to a figure

below their true value, such value can be subsequently adjusted, the credit thus created being used to extinguish or reduce a debit balance on profit and loss account, thus enabling subsequent profits to be distributed as dividend (*Stapley v. Read Bros.* (1924), 2 Ch. 1). The asset should not be written up beyond its true value, and the amount represented by such increase should not be utilised directly for dividend purposes, although presumably such a course would not be illegal. In the course of his judgment in the above case, Russell J. questioned whether the company had finally and irrevocably capitalised those profits (*i.e.*, the past appropriations for over-depreciation) so as to disentitle themselves for ever afterwards from restoring them to reserve and from dealing with them as profits. Although the accounts had been passed by the shareholders in general meeting, he was not satisfied that the shareholders thereby intended or bound themselves for all time and in all circumstances to give up their claims to these profits and to treat them as capital only.

§ 5.—Dividends.

The Articles generally empower the company in general meeting to declare a dividend, but this power is usually subject to a recommendation by the directors that a dividend be declared. Where the Articles provide that the directors may declare a dividend, or that the company may do so upon the recommendation of the directors, it is a matter for their discretion whether or not to make the declaration or recommendation as the case may be. A company cannot in any case require a distribution of dividends out of capital.

Dividends must be paid in cash, unless the Articles authorise their payment in any other manner (*Wood v. Odessa Water Works* (1889), 42 Ch. D. 636).

In the absence of special Articles, dividends must, under the original Table A of 1862, be paid in proportion to the nominal value of the shares. If the present Table A applies, under Clause 92 they are to be paid in proportion to the amounts paid up on the shares. If Table A is excluded and no alternative provision is made, or it is provided that the profits are to be divided among the shareholders in proportion to their shares, dividends are to be paid on the nominal value of the shares (*Oakbank Oil Co. v. Crum* (1882), 8 A.C. 65).

Where a dividend is paid in respect of arrears on cumulative preference shares issued at different times, it must be distributed rateably according to the arrears on the respective shares (*First Garden City v. Bonham-Carter* (1928), 1 Ch. 53).

Final dividends are due as a debt as soon as declared, and become statute-barred in 20 years, unless a shorter time be fixed by the Articles (*Artisans Land and Mortgage Corporation* (1904), 1 Ch. 796), but a sum due to any member in his character of member, by way of dividend, profits or otherwise cannot rank in competition with any debt due to a creditor in the winding-up of the company (§ 157 (1) (g)).

The profits out of which a dividend is declared need not be actually realised (*City of Glasgow Bank v. McKinnon* (1882), 9 R. Ct. of Sess. 535), unless the company's regulations provide that only realised profits shall be so utilised (*Oxford Benefit Building Society* (1886), 35 Ch. D. 502); but capital profits must always be realised (*Lubbock v. British Bank of South America, supra*; *Foster v. New Trinidad Lake Asphalt Co., supra*).

In the absence of regulations in the Articles to the contrary, directors may always carry profits to reserve even if the dividend of preference shareholders thereby remains unpaid (*Bond v. Barrow Haematite Steel Co.* (1902), 1 Ch. 358); and under Table A this power is specifically given in clause 93. Any such reserves retain the character of profits unless they are actually capitalised (*Bridgewater Navigation Co.* (1891), 2 Ch. 317).

Where a company issued notes which entitled the noteholders to a fixed amount per cent. and an additional share in the "profits available for dividend" after payment of eight per cent. on the ordinary shares, it was held that the directors were entitled to apply the whole of the profits of any one year, after paying the fixed amount per cent. to the noteholders, in reduction of the adverse balances of previous years, and the noteholders were not entitled to claim a share in such profits (*Long Acre Press v. Odhams Press* (1930), 2 Ch. 196).

If the Articles specifically provide for the appropriation of profits without giving power to create a reserve out of profits, this will negative the implied inclusion of clause 93 of Table A, and such a reserve cannot be created (*Paterson v. Paterson* (1917), S.C. (H.L.) 13).

On the other hand if the Articles specify a mode of setting aside a reserve, a member can obtain a declaration that all remaining profits must be applied in accordance with the provisions of the Articles (*Euling v. Israel & Oppenheimer* (1918), 1 Ch. 101).

Where power is given in the Articles, interim dividends may be paid, and this power is contained in clause 90 of Table A.

If the directors, after declaring an interim dividend, find that it would have to be paid out of capital, they may cancel the declaration at any time before payment (*Lagunas Nitrate Co. v. Schroeder* (1901), 85 L.T. 22).

Directors who pay dividends out of capital are jointly and severally liable to replace the amount with interest at five per cent. per annum (*Oxford Benefit Building Society, supra, London & General Bank* (1895), 2 Ch. 166); but only directors who are parties to the improper declaration are subject to this liability.

In *Lucas v. Fitzgerald* ((1903), 20 T.L.R. 16) the directors, being deceived by the managing director, declared an interim dividend; at the end of the year it turned out that there had been a loss. In an action brought against the directors for the wrongful declaration of the dividend, it was held that directors who had not been present at the meeting of the board at which the declaration took place, although they had been present at a subsequent meeting at which the minutes of the previous meeting were confirmed, could not be held liable.

If a director be forced to pay back such amounts, he has a right of contribution from all other directors who are equally liable with himself; and by § 372 of the Act the Court may relieve from liability, either wholly or partly, a director who has been guilty of negligence or breach of trust, but who, in the opinion of the Court, has acted honestly and reasonably and having regard to all the circumstances of the case, ought fairly to be excused.

If members participate in a distribution of dividend knowing that it has been paid out of capital, the

amounts may be followed into their hands and recovered from them (*Moxham v. Grant* (1900), 1 Q.B. 88); and shareholders receiving a dividend out of capital with full knowledge of the facts cannot compel restitution by the directors (*Towers v. African Tug Co.* (1904), 1 Ch. 558).

Directors will not be responsible for a dividend wrongly paid if they relied upon a *bonâ fide* valuation which subsequently turned out to be too high (*Stringer's Case* (1869), 4 Ch. App. 475; *Rance's Case* (1870), 6 Ch. App. 104); and they are entitled to rely, in the absence of suspicious circumstances, upon the officers of the company (*Dovey v. Cory* (1901), A.C. 477).

The original Table A of 1862 contained a clause giving power to the directors to forfeit dividends if unclaimed within a period of three years, but the present Table A contains no such provision; and, subject to the Articles in any particular case, the right to demand payment of dividends which have been declared is lost only at the expiration of twenty years. They constitute a debt due by the company immediately they are declared, and the Statute of Limitations will run from that date (*Re Severn and Wye Railway Co.* (1896), 1 Ch. 559). Where a company has taken power in its Articles to forfeit unclaimed dividends, such power must be honestly exercised. In *Ward v. Dublin North City Milling Co.* ((1919), 1 Ir. R. 5—M.R.) the facts revealed that provision had been made for forfeiture, notice to be given to the person whose name appeared first on the register in cases where the shares were jointly held. In the case in question, the first holder was deceased, a fact of which the company had unofficial knowledge, and the second holder, being resident abroad, was not cognisant of the forfeiture which had been effected.

It was held that the company must account for the dividends so treated.

Where dividends have been declared, but remain unpaid at the commencement of the winding-up of a company, sums due to a member in respect of that declaration cannot be paid to him in competition with any other creditor who is not a member of the company: but the sums so due may be taken into account in the final adjustment of the rights of the contributories amongst themselves (§ 157 (1) (g)).

§ 6.—Bonuses.

A company so empowered by its Articles may decide to capitalise undivided profits, and divide them as capital by utilising them to pay up an issue of bonus shares, or in payment of a contemporaneous call, or an issue of bonus debentures. The real intention of the company must be looked at, and if it is obviously its intention that the profits be effectively capitalised, that intention prevails; it is a question of fact in each case (*Jones v. Evans* (1913), 1 Ch. 23; *Andrew v. Thomas* (1916), 2 Ch. 331). There must be an increase of issued capital (which term in this respect includes debentures) to constitute an effective capitalisation of distributable profits (see remarks of Eve, J., in *Re Bates* (1928), 1 Ch. 682). If there is a division of the company's assets, this does not constitute a capitalisation of profits; where there is an option on the members to take shares or cash, the profits utilised in paying up the shares are effectively capitalised, but those taken in cash are not (*Commissioners of Inland Revenue v. Wright* (1927), 1 K.B. 333). The effective capitalisation is of importance as between the life tenant and remainderman of an estate, and for the purposes of sur-tax.

SYNOPSIS OF CHAPTER XIII.

THE AUDITORS.

- § 1 —THE POSITION OF AUDITORS.
- 2 APPOINTMENT AND REMUNERATION
- 3 —AUDITOR AS OFFICER OF THE COMPANY.
- 4 —RIGHTS AND DUTIES
- 5 —THE REPORT FOR THE STATUTORY MEETING.
- 6 —THE ANNUAL RETURN.
- 7 —LIABILITY OF AUDITORS

CHAPTER XIII.

THE AUDITORS.

§ 1.—The Position of Auditors.

Every company is required by the Companies Act to appoint auditors for the purpose of examining the accounts and reporting on the balance sheets laid before the company. Since members of the company have no control over its transactions and little or no access to the books, it is necessary that their interests should be safeguarded by a proper examination of the accounts presented to them by the directors. No provision is made as to the professional status of the auditors, but it is the usual practice to appoint professional accountants.

The auditor of the company, so far as his actual duties are concerned, is the agent of the shareholders, even where he is not appointed by them; but he is not the agent of the shareholders in respect of work done on behalf of the directors in his capacity as accountant. Although the auditor is the agent of the shareholders, notice to him of certain facts relating to the company is not necessarily notice to his principals so as to prevent them from afterwards exercising their rights in respect of wrongful acts of the directors or others, of which the auditor had knowledge (*Spackman v. Evans* (1868), 3 H.L. 171).

§ 2.—Appointment and Remuneration.

Every company must at each annual general meeting appoint an auditor or auditors to hold office until the next annual general meeting (§ 132 (1)).

If an appointment of auditors is not made at an annual general meeting, the Board of Trade may, on the application of any member of the company, appoint an auditor of the company for the current year (§ 132 (2)).

A person, other than a retiring auditor, is not capable of being appointed auditor at an annual general meeting unless notice of an intention to nominate that person to the office of auditor has been given by a member to the company not less than fourteen days before the annual general meeting, and the company must send a copy of any such notice to the retiring auditor, and give notice thereof to the members, either by advertisement or in any other mode allowed by the Articles, not less than seven days before the annual general meeting; but if, after notice of the intention to nominate an auditor has been so given, an annual general meeting is called for a date fourteen days or less after the notice has been given, the notice, though not given within the required time, is deemed to have been properly given, and the notice to be sent or given by the company may be sent or given at the same time as the notice of the annual general meeting.

The first auditors of the company may be appointed by the directors at any time before the first annual general meeting, and auditors so appointed hold office until that meeting; but

- (a) the company may at a general meeting of which notice has been served on the auditors in the same manner as on members of the

company remove any such auditors and appoint in their place any other persons being persons who have been nominated for appointment by any member of the company and of whose nomination notice has been given to the members of the company not less than seven days before the date of the meeting ; and

- (b) if the directors fail to exercise their powers of appointment, the company in general meeting may appoint the first auditors, and thereupon the said powers of the directors cease (§ 132 (4, 5)).

The directors may fill any casual vacancy in the office of auditor, but while any such vacancy continues the surviving or continuing auditor or auditors, if any, may act.

The remuneration of the auditors of a company must be fixed by the company in general meeting, except that the remuneration of an auditor appointed before the first annual general meeting, or of an auditor appointed to fill a casual vacancy, may be fixed by the directors, and that the remuneration of an auditor appointed by the Board of Trade may be fixed by the Board (§ 132 (6)).

None of the following persons is qualified for appointment as auditor of a company—

- (a) a director or officer of the company ;
- (b) except where the company is a private company, a person who is a partner of or in the employment of an officer of the company ;
- (c) a body corporate.

Any body corporate which acts as auditor of a company is liable to a fine not exceeding one hundred

pounds, unless acting under an appointment made before 3rd August, 1928. In Scotland the expression "body corporate" does not include a firm (§ 133).

§ 3.—Auditor as Officer of the Company.

Proceedings may be taken against auditors under the provisions as to misfeasance now contained in § 276 of the Act.

The auditor has been held to be an officer of the company for the purpose of such proceedings (*London & General Bank* (1895), 2 Ch. 166; *Kingston Cotton Mill Co.* (1896), 1 Ch. 6).

An accountant doing work for the directors, not being appointed auditor, is not an officer of the company (*Western Counties Steam Bakeries* (1897), 1 Ch. 617).

Though it is uncertain whether or not the auditor is an officer for all purposes, it is important for him to see that any wrongful act, in respect of which he might be liable to a penalty for concurrence as an officer, is rectified as soon as possible after it comes under his observation.

§ 4.—Rights and Duties.

The auditors must make a report to the members on the accounts examined by them, and on every balance sheet laid before the company in general meeting during their tenure of office, and the report must state—

- (a) whether or not they have obtained all the information and explanations they have required; and

- (b) whether, in their opinion, the balance sheet referred to in the report is properly drawn up so as to exhibit a true and correct view of the state of the company's affairs according to the best of their information and the explanations given to them, and as shown by the books of the company.

Every auditor of a company has a right of access at all times to the books and accounts and vouchers of the company, and is entitled to require from the directors and officers of the company such information and explanation as may be necessary for the performance of the duties of the auditors ; but in the case of a banking company which was registered after the 15th August, 1879, and which has branch banks beyond the limits of Europe, it is sufficient if the auditor is allowed access to such copies and extracts from such books and accounts of any such branch as have been transmitted to the head office of the company in Great Britain.

The auditors of a company are entitled to attend any general meeting of the company at which any accounts which have been examined or reported on by them are to be laid before the company and to make any statement or explanation they desire with respect to the accounts (§ 134).

It will be observed that no information as to the technical nature of an auditor's duties is given in the Act, nor is it laid down that there shall be a complete audit of the company's transactions during the period covered by the accounts. The work to be done by the auditor is very largely a matter for his own judgment ; resting principally upon the methods upon which the books have been kept and the internal

check in operation. But in any case he must use his own judgment, and not act against it; and he must do such work as will enable him to report as to whether the balance sheet does, or does not, show the true and correct position of affairs according to the books. Under § 128, if the accounts do not sufficiently reveal the necessary information with regard to loans made by the company to its directors or officers or to the remuneration paid to directors, the auditors must include in their report on the balance sheet a statement giving the required particulars.

The auditors may also be called upon to certify a statement furnished to the members of the company under the provisions of § 148, giving particulars of the remuneration paid to directors during the last three preceding years in respect of which the accounts of the company have been made up.

In the event of a prosecution being instituted following an enquiry by inspectors appointed by the Board of Trade as a result of a requisition of members under the provisions of § 135, the auditors may be called upon to give such assistance as may be required (§ 136).

Where any prospectus is issued by the company, there must be included a report by the auditors relating to the profits, dividends paid, etc., for each of the three previous financial years or such less period as may be available where the company has not been carrying on a business for the full period of three years (Fourth Schedule, Parts II and III).

The following extracts from judgments in leading cases indicate the judicial interpretation of the auditor's position :—

“ It is no part of an auditor's duty to give advice either to directors or shareholders as to what they ought to do ” (*London and General Bank* (1895), 2 Ch. 682).

“ Where there is nothing to excite suspicion and a few cases are taken haphazard and found to be right, it is reasonable to assume that others like them are correct also ” (*London and General Bank, supra*).

“ It is the duty of an auditor to bring to bear on the work he has to perform that skill, care and caution which a reasonably competent, careful and cautious auditor would use. What is reasonable skill, care and caution must depend on the particular circumstances of each case. An auditor is not bound to be a detective, or, as was said, to approach his work with suspicion, or with a foregone conclusion that there is something wrong. He is a watch-dog, not a bloodhound. He is justified in believing tried servants of the company in whom confidence is placed by the company. He is entitled to assume that they are honest, and to rely upon their representations, provided he takes reasonable care. If there is anything calculated to excite suspicion, he should probe it to the bottom ; but in the absence of anything of that kind he is only bound to be reasonably cautious and careful ” (*Kingston Cotton Mill Co.* (1896), 2 Ch. 288, 289).

“ It is not the auditor's duty to take stock.”
“ There are many matters in which he must rely on the honesty and accuracy of others ” (*Kingston Cotton Mill Co., supra*).

The auditor “ does not guarantee the discovery of all fraud ” (*Kingston Cotton Mill Co., supra*).

The auditor may incur liability for damage sustained by a company by reason of his omission to verify the existence of assets stated in the balance sheet *London Oil Storage Co., Ltd., v. Seear, Hasluck & Co.* (1904), 31 Acct. L.R. 1; but in any claim for damages for negligence it must be proved that damage resulted from the negligence, whether the claim is made against a person acting as auditor or as accountant only (*Bolivia Exploration Syndicate* (1913), 30 T.L.R. 146; *Squire, Cash Chemists, Ltd., v. Ball, Baker & Co.* (1912), 28 T.L.R. 81).

Auditors are bound to see what exceptional duties (if any) are cast upon them by the Articles of the company whose accounts they are called upon to audit. Ignorance of the Articles, and of exceptional duties imposed by them would not afford any legal justification for not observing them (*Leeds Estate Building and Investment Co. v. Shepherd* (1887), 36 Ch. D. 787).

Any provisions in the regulations of the company inconsistent with statute law are *ultra vires*, e.g., an Article restraining the auditors from disclosing facts in their report as to the secret reserves of the company is invalid (*Newton v. Birmingham Small Arms Co.* (1906), 2 Ch. 378).

Although the auditors of a company are entitled to access to the books, the directors will not be bound in all circumstances to produce them. If there is any *bond fide* reason for refusal, the Court will not interfere before a general meeting of the company has been held, at which the shareholders may have an opportunity of stating whether or not they desire that the auditor should continue to act as such; the Court will not force on an unwilling company

auditors whom they do not approve (*Cuff v. London and County Land and Building Co.* (1912), 1 Ch. 440).

It is doubtful whether an auditor has a lien in respect of books which he has audited, even though he properly obtains absolute possession of such books and improves the records contained therein during the course of his audit. He will probably have such a lien if he acts as accountant (*Burleigh v. Ingram Clarke* (1901), 27 Acct. L.R. 65). Such books, however, cannot be withheld from the liquidator of the company (*Re Arthur Francis* (1911), 44 Acct. L.R. 61).

§ 5.—The Report for the Statutory Meeting.

The report of the directors which is submitted to the statutory meeting, so far as it relates to the shares allotted by the company, to the cash received in respect of such shares, and to the receipts and payments of the company on capital account, must be certified as correct by the auditors (if any) of the company (§ 113).

No statutory report is necessary for a private company; the auditor to a private company is therefore not required to perform any duties under this section (§ 113).

§ 6.—The Annual Return.

Every company having a share capital is required by §§ 108-110 of the Act to file an annual return.

Except in the case of private companies, and in the case of assurance companies which have complied with the provisions of § 7 (4) of the Assurance Companies Act, 1909, as to submitting accounts, the

annual return must include a written copy certified by a director or the manager or secretary of the company to be a true copy, of the last balance sheet which has been audited by the company's auditors, including every document required by law to be annexed thereto, together with a copy of the report of the auditors thereon. The auditors consequently have no special duties in connection with the annual summary apart from the balance sheet with which they have already dealt.

§ 7.—Liability of Auditors.

Auditors are liable for negligence in the performance of their duties, and this can be enforced against them by action while the company is a going concern, or by misfeasance proceedings under § 276 of the Act if the company is being wound up.

The provisions of § 152 as to rendering void clauses in the Articles included with the object of indemnifying officers of the company from the consequences of their negligence, default or breach of duty (*see* Chap. X, § 13), extend to auditors. The enactment of the section referred to was, in fact, directly induced by the decision in *re City Equitable Fire Insurance Co.* ((1925) Ch. 407 C.A.) in which case action was brought against the auditor of the company for alleged negligence in the performance of his duties.

They are also criminally liable for wilfully making false statements in any report or balance sheet under § 362 of the Act, which reads :—

362. If any person in any return, report, certificate, balance sheet, or other document, required by or for the purposes of any of the provisions of this Act specified in the Eleventh Schedule hereto, wilfully makes a statement false in any material particular, knowing it to be false, he shall be guilty of a misdemeanour, and shall be liable on conviction in Scotland

on indictment to imprisonment for a term not exceeding two years, with or without hard labour, and be liable on summary conviction in England or Scotland to imprisonment for a term not exceeding four months, with or without hard labour, and in either case to a fine in lieu of or in addition to such imprisonment as aforesaid

Provided that—

- (a) the fine imposed on summary conviction shall not exceed one hundred pounds
- (b) nothing in this section shall affect the provisions of the Perjury Act, 1911

The Perjury Act, 1911 (§ 5), provides that persons guilty of offences similar to those outlined in § 362 shall be liable on conviction to imprisonment for a term not exceeding two years, with or without hard labour.

A detailed study of the rights and duties of auditors, and of the cases bearing thereon, is outside the scope of this work, but will be found in Spicer and Pegler's "Practical Auditing."

SYNOPSIS OF CHAPTER XIV.

**ARRANGEMENTS WITH CREDITORS,
RECONSTRUCTION, AND WINDING-UP.**

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CHAPTER XIV.

ARRANGEMENTS WITH CREDITORS, RECONSTRUCTION, AND WINDING-UP.

§ 1.—Compromises and Arrangements.

Compromises and arrangements include all forms of effective modification of existing rights and liabilities between parties whether by agreement or otherwise. Individual compromises will usually result from reciprocal agreement, but the Companies Act makes provision also for collective arrangements which will operate to bind a whole class of persons including any dissentient minority of that class.

One of the most important of these provisions is contained in § 153 which enacts that where a compromise or arrangement is proposed between a company and its creditors or any class of them, or between the company and its members or any class of them, the Court may, on the application in a summary way of the company or of any creditor or member of the company or, in the case of a company being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members of the company or class of members, as the case may be, to be summoned in such manner as the Court directs.

If a MAJORITY IN NUMBER REPRESENTING THREE-FOURTHS IN VALUE of the creditors or class of creditors, or members or class of members, as the case may be, present and voting either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement, if sanctioned by the Court, is binding on all the creditors or the class of creditors, or on the members or class of members, as the case may be, and also on the company or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company.

An order of the Court sanctioning the arrangement has no effect until an office copy of the order has been delivered to the Registrar of Companies for registration, and a copy of every such order must be annexed to every copy of the Memorandum of the company issued after the order has been made, or, in the case of a company not having a Memorandum, of every copy so issued of the instrument constituting or defining the constitution of the company. If a company makes default in complying with this provision, the company and every officer of the company who is in default is liable to a fine not exceeding one pound for each copy in respect of which default is made.

The expression "company" as used above means any company liable to be wound up under the Act, and the expression "arrangement" includes a re-organisation of the share capital of the company by the consolidation of shares of different classes, or by the division of shares into shares of different classes, or by both those methods (§ 153).

Where an application is made to the Court under § 153 for the sanctioning of a compromise or arrangement proposed between a company and any such

persons as are mentioned in that section, and it is shown to the Court that the compromise or arrangement has been proposed FOR THE PURPOSES OF OR IN CONNECTION WITH A SCHEME FOR THE RECONSTRUCTION OF ANY COMPANY or companies OR THE AMALGAMATION of any two or more companies, and that under the scheme the whole or any part of the undertaking or the property of any company concerned in the scheme (referred to as "a transferor company") is to be transferred to another company (referred to as "the transferee company"), the Court may, either by the order sanctioning the compromise or arrangement or by any subsequent order, make provision for all or any of the following matters :—

- (a) the transfer to the transferee company of the whole or any part of the undertaking and of the property or liabilities of any transferor company ;
- (b) the allotting or appropriation by the transferee company of any shares, debentures, policies, or other like interests in that company which under the compromise or arrangement are to be allotted or appropriated by that company to or for any person ;
- (c) the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company ;
- (d) the dissolution, without winding-up, of any transferor company ;
- (e) the provision to be made for any persons, who within such time and in such manner as the Court direct, dissent from the compromise or arrangement ;

- (f) such incidental, consequential and supplemental matters as are necessary to secure that the reconstruction or amalgamation shall be fully and effectively carried out.

Where such an order provides for the transfer of property or liabilities, that property is, by virtue of the order, transferred to and vests in, and those liabilities are, by virtue of the order, transferred to and become the liabilities of, the transferee company, and in the case of any property, if the order so directs, freed from any charge which is by virtue of the compromise or arrangement to cease to have effect.

Every company in relation to which the order is made must cause an office copy thereof to be delivered to the Registrar of Companies for registration within seven days after the making of the order, and if default is made the company and every officer of the company who is in default is liable to a default fine, *i.e.*, a fine not exceeding £5 a day (§ 154).

The expression "property" as used above includes property, rights and powers of every description, and the expression "liabilities" includes duties, but the expression "company" as used in § 154 does not include any company other than a company within the meaning of the Act (§ 154), *i.e.*, although the Court can sanction a scheme of arrangement or compromise in the case of any company capable of being wound up under the Act, it can only extend that order as above where the company is formed under the Companies Act, 1929, or the earlier Companies Acts. The provisions of § 154 can be invoked even where the scheme does not provide for the winding-up of the transferor company (*Star Tea Co.* (1930), W.N. 4).

If a company is already in process of being wound up voluntarily, and a scheme of reorganisation of capital is proposed, in order to enable the business of the company to be continued, the Court, in approving the scheme under § 153, can order all further proceedings in the liquidation to be stayed (*In re Walters & Sons* (1926), 70 S.J. 953).

It is well to ascertain before commencing proceedings that the scheme to be proposed will have the support of the necessary majority of those interested.

If a scheme of arrangement involves a reduction of capital the provisions of §§ 55-58 relating thereto must also be complied with (*Cooper, Cooper and Johnson* (1902), W.N. 199).

The application must be made to the Court having jurisdiction to wind up the company, for leave to call meetings and for direction as to the holding of the meetings. This application will be made by the liquidator if the company is in liquidation; otherwise by the company itself, a member, or a creditor. The order directs what meetings are to be held, fixes the days for the meetings, and directs what advertisements are to be made.

Meetings of each class of creditors or shareholders affected must be held (*Sovereign Life Assurance Co. v. Dodd* (1892), 2 Q.B. 573), and members whose shares are paid up in advance form a different class from those whose shares are not so paid (*United Provident Assurance Co.* (1910), 2 Ch. 477). If it is proposed to alter the rights of shareholders, separate meetings of the different classes of shareholders (cumulative preference, non-cumulative preference, ordinary, etc.), must also be held.

At the meetings the chairman lays the scheme before those present, and it is voted upon. The majority required is a majority in number amounting to three-fourths in value of those present and voting either in person or by proxy. A majority of the whole body of creditors or members is not necessary so long as the requisite majority is obtained at the meeting (*Bessemer Steel Co.* (1876), 1 Ch. D. 251).

After the meetings have been held the chairman reports to the Court, showing the number present personally or by proxy, the amounts represented by them, and the result of the voting, with the names of those who voted for and against the resolution.

A petition is then presented to the Court asking for sanction of the scheme. The Court has absolute discretion as to giving or refusing sanction, and may require certain modifications in the scheme to be made as a condition of sanction.

The scheme when once sanctioned is binding on all members of the class affected.

The Court may, in its discretion, stay an execution sought to be levied by a judgment creditor, where a petition has been presented against the company, whilst arrangements are pending under this section in order to protect the assets of the company and to secure equality amongst all creditors of the same class (*Bowkell v. Fuller's United Electric Works, Ltd.* (1923), 1 K.B. 160).

It has been held in a Scottish case that where there exist reasonable doubts as to the rights of members under the Memorandum of Association, that is a ground warranting the Court in sanctioning a scheme of arrangement the effect of which is to remove those doubts (*Edinburgh Railway Access and Property Co. v. Scottish Metropolitan Assurance Co.* (1932), S.C. 2).

A scheme involving cancellation of arrears of cumulative preference dividend will be sanctioned by the Court, even though the company's own regulations contain no power for such cancellation (*Re Balmenach-Glenlivet Distillery* (1916), S.C. 639).

Debenture holders or any class of them may also be deprived in whole or in part of their rights, or may be forced to take shares instead of their debentures (*Empire Mining Co.* (1890), 44 Ch. D. 402); and in the same way the debts due to unsecured creditors may be compounded or satisfied by the allotment of shares.

The advantages of a scheme under § 153 of the Act over a reconstruction under § 234 (see § 3 of this chapter) are as follows :—

- (1) The majority of a class of creditors can bind the minority.
- (2) It is not absolutely necessary to form a new company, thus saving certain expenses of registering a new company, and stamp duty on the transfer of assets, in-so-far as these are not given exemption by § 55, Finance Act, 1927 (see Chap II, § 3).
- (3) The facilities of § 154 may be invoked, but if the transferee company is not a company within the definition of the Act, then § 234 is appropriate.

This method cannot be used to compel dissentients to take shares in another company. In order to sell the assets of one company for shares in another company, with a view to the distribution of such shares amongst the shareholders of the vendor company, proceedings must be under § 234 of the Act

(*General Motor Cab Co.* (1913), 1 Ch. 377). It will be noted that a company may dispose of its assets even to a foreign company under § 234.

It was held, however, in *re Sandwell Park Colliery Co. Ltd* ((1914), 1 Ch. 589), that a scheme under § 153 might be sanctioned which provided for the sale of the assets to a new company for shares if all classes of shareholders agreed, and all creditors either had been paid in full or assented to the scheme and accepted the new company as their debtor; but only if the scheme expressly reserved the right of dissentients under § 234.

Schemes under this section involve the distribution of the shares acquired in the transferee company amongst the shareholders of the vendor company, but in some cases it is desired to acquire shares in another company to be held as assets by the company acquiring them. Where such shares have been issued as consideration for the whole or part of the undertaking or property of the acquiring company, the matter is usually one of arrangement agreed to by both companies, or the consideration may be for cash on an agreed basis.

Where a scheme or contract involving the transfer of shares or any class of shares in a company (referred to as "the transferor company") to another company, whether a company within the meaning of the Act or not (referred to as "the transferee company"), has within four months after the making of the offer in that behalf by the transferee company been approved by the holders of not less than nine-tenths in value of the shares affected, the transferee company may, at any time within two months after the expiration of the said four months, give notice

in the prescribed manner to any dissenting shareholder that it desires to acquire his shares, and where such a notice is given the transferee company is, unless on an application made by the dissenting shareholder within one month from the date on which the notice was given the Court thinks fit to order otherwise, entitled and bound to acquire those shares on the terms on which under the scheme or contract the shares of the approving shareholders are to be transferred to the transferee company.

Where a notice has been given by the transferee company and the Court has not, on an application made by the dissenting shareholder, ordered to the contrary, the transferee company must, on the expiration of one month from the date on which the notice has been given, or, if an application to the Court by the dissenting shareholder is then pending, after that application has been disposed of, transmit a copy of the notice to the transferor company and pay or transfer to the transferor company the amount or other consideration representing the price payable by the transferee company for the shares which that company is entitled to acquire, and the transferor company must thereupon register the transferee company as the holder of those shares.

Any sums so received by the transferor company must be paid into a separate bank account, and any such sums and any other consideration so received must be held by that company on trust for the several persons entitled to the shares in respect of which the said sums or other consideration were respectively received.

The expression "dissenting shareholder" includes a shareholder who has not assented to the scheme or

contract and any shareholder who has failed or refused to transfer his shares to the transferee company in accordance with the scheme or contract (§ 155).

Where any scheme involves the transfer of the whole or any part of the undertaking or property of a company, there can be no payment to any director of the company by way of compensation for loss of office unless the particulars of the proposed payment have been disclosed to the members and approved by them (*see* Chap X, § 3).

A company can, of course, make arrangements with its creditors just like an individual, and such arrangements do not require registration under the Deeds of Arrangement Act, 1914 (*Re Rileys, Ltd.* (1903), 2 Ch. 590); but an assignment of all its property to a trustee for the benefit of all its creditors is void (§ 265).

In voluntary liquidation a company can make an arrangement under § 251 of the Act with its creditors; such an arrangement is binding on the company if sanctioned by extraordinary resolution, and on the creditors if agreed to by three-fourths in number and value of the creditors. Any creditor or contributory may within three weeks from the completion of the arrangement appeal to the Court against it, and the Court may then amend, vary or confirm it.

This is not, however, so convenient as an arrangement under § 153. It necessitates liquidation and the majority is not so easily obtained.

§ 2.—Reorganisation of Capital.

A reorganisation of capital may take the form of either an alteration in the rights of one or more classes of shareholders or the consolidation or subdivision

of shares with or without the alteration of rights attaching thereto.

The alteration of rights (which may be in connection with dividends or capital or both) may be effected in accordance with powers taken in the Memorandum and Articles, or where no such power exists, under the provisions of § 153. The procedure involved in the former case has been dealt with in Chap. VII, § 9.

The consolidation or sub-division of shares may be effected by the sanction of the company in general meeting (§ 50), but when such a scheme involves disturbance of the rights attaching to various classes of shares, the provisions of § 153 will operate.

Any scheme involving reduction of capital must be carried out in accordance with §§ 55-60 of the Act.

§ 3.—Reconstruction.

A reconstruction denotes the transfer of the assets and undertaking of a company to a new company formed specifically for the purpose of the acquisition and invested by its Memorandum and Articles with objects and powers more appropriate to meet new conditions than those of the transferor company. A modification of the capital structure of a company without any transfer of its property is also loosely referred to as a reconstruction, but this process is more properly described as a reorganisation of capital.

A reconstruction usually takes the form of a sale of the assets of the reconstructing company to a new company, in consideration of shares or debentures in the new company, with, in most cases, a distribution of such shares or debentures among the shareholders of the old company, who thus become interested in the new company. Any shares in the

new company may be either fully paid or with a liability attached to them.

Such reconstruction is usually resorted to either for the purpose of entirely altering the objects of the company, or as a means of obtaining additional capital by an assessment on the holders of fully-paid shares.

This sale may take place either under a power given by the objects clause of the original company or under the provisions of § 234 by which, where a company is proposed to be, or is in course of being, wound up altogether voluntarily, and the whole or part of its business or property is proposed to be transferred or sold to another company whether a company within the meaning of the Act or not (called "the transferee company"), the liquidator of the first-mentioned company (called "the transferor company") may, with the sanction of a special resolution of that company, conferring either a general authority on the liquidator or an authority in respect of any particular arrangement, receive in compensation or part compensation for the transfer or sale, shares, policies, or other like interests in the transferee company, for distribution among the members of the transferor company, or may enter into any other arrangement whereby the members of the transferor company may, in lieu of receiving cash, shares, policies, or other like interests, or in addition thereto, participate in the profits of or receive any other benefit from the transferee company.

Any such sale or arrangement is binding on the members of the transferor company.

If any member of the transferor company who did not vote in favour of the special resolution expresses

his dissent therefrom in writing addressed to the liquidator, and left at the registered office of the company within seven days after the passing of the resolution, he may require the liquidator either to abstain from carrying the resolution into effect, or to purchase his interest at a price to be determined by agreement or by arbitration in accordance with the provisions of the Companies (Clauses Consolidation Act, 1845, or, in the case of a winding-up in Scotland, the Companies (Clauses Consolidation (Scotland) Act, 1845, with respect to the settlement of disputes by arbitration, and in the construction of those provisions the Act of 1929 is deemed to be the special Act, and the "company" means the transferor company, and any appointment by the said incorporated provisions directed to be made under the hand of the secretary, or any two of the directors, may be made under the hand of the liquidator, or, if there is more than one liquidator, then of any two or more of the liquidators.

If the liquidator elects to purchase the member's interest, the purchase money must be paid before the company is dissolved, and be raised by the liquidator in such manner as may be determined by special resolution.

A special resolution is not invalid for these purposes by reason that it is passed before or concurrently with a resolution for voluntary winding-up, or for appointing liquidators, but if an order is made within a year for winding-up the company by or subject to the supervision of the Court, the special resolution will not be valid unless sanctioned by the Court (§ 234).

In a creditors' voluntary winding-up, the powers of the liquidator under § 234 can only be exercised

with the sanction either of the Court or of the committee of inspection (§ 243).

It was at one time thought that where power was taken in the Memorandum itself to sell the business in this way to a new company, dissentient shareholders might be deprived of their right to claim to be bought out, and might be forced to accept a new liability, or to lose their status as shareholders or accept such price for their shares as the company might decide.

Probably this may be the case where the selling company is authorised, and is in a position itself to hold the shares in the purchasing company, since it need not then at once go into liquidation and distribute the shares among its members; but where the company is not in such a position, having no assets with which to discharge a future liability on the shares, the Court of Appeal decided, in the case of *Bisgood v. Henderson's Transvaal Estates* ((1908), 1 Ch. 743), that this is not the case, since it cannot be part of a company's business to distribute its assets among its members; this can only be done in liquidation. Therefore immediately it is proposed to distribute the new shares among its members, the company must be considered as being "proposed to be or in course of being" wound up voluntarily, and in consequence a dissentient member may claim his remedies under § 234 of the Act.

The notice of dissent can be given by an executor of a deceased member, even though the executor has not himself been registered as a member (*Llewelyn v. Kasintoe Rubber Estates* (1914), 2 Ch. 670).

The interests of dissentients being thus safeguarded, there is nothing unjust or illegal even if the scheme provides—

- (1) That the shares be partly paid ;
 - (2) That the shares must be applied for within a limited time ;
 - (3) That shares not applied for shall be sold, and the dissenting member shall take the proceeds ;
- since any such provision will only apply where the dissentient fails to avail himself of his statutory remedy.

The sale must be authorised by special resolution even though the Memorandum gives power to sell for shares in another company (*Etheridge v. Central Uruguay, etc., Railway* (1913), 1 Ch. 245).

The Articles cannot take away the right of a dissentient shareholder complying with the section to have his interest purchased by the liquidator (*Payne v. Cork Co.* (1900), 1 Ch. 308), or to have the price thereof determined by arbitration in the absence of agreement (*Baring Gould v. Sharpington Pick Syndicate* (1899), 2 Ch. 80).

The shares received from the purchasing company must be distributed amongst the members of the selling company strictly in accordance with their rights (*Griffiths v. Paget* (1877), 5 Ch. D. 894) ; but the rights may, prior to proceeding under § 234, be altered by a reorganisation of capital under § 153 of the Act.

The power of reorganisation is important, since if preference shareholders have a preference as to capital, they are entitled to be repaid in full before other classes of shares receive anything, and it may be difficult to determine exactly how this is to be done when there are only shares to be divided.

If the Memorandum or Articles of the selling company give preference shares no preferential rights as to capital, all the members are on the same footing

in the distribution of the assets. Thus a scheme by which the holders of shares giving a preferential right as to dividend only were to receive preference shares in the new company, while the holders of ordinary shares in the selling company were to get ordinary shares only, could not be carried out without re-organising the capital.

Under the Companies Clauses Consolidation Act, 1845, a single arbitrator may be agreed upon whose decision is final; or each party may nominate an arbitrator, and on failure of one party to nominate, the other party may direct his own arbitrator to act for both.

Joint arbitrators may appoint an umpire, whose decision is final. In respect of the arbitration no examination of officers will be ordered under § 214 of the Act for the purpose of obtaining evidence to advance the value of the shares (*British Building Stone Co., Ltd.* (1908), 2 Ch. 450).

§ 4.—Relief from Stamp Duties.

Reference should be made to Chapter II, § 3, for the provisions of the Finance Act, 1927, § 55, whereby relief is granted in respect of *ad valorem* and stamp duties in connection with the reconstruction of a company or the amalgamation of two or more companies.

Section 42 of the Finance Act, 1930, provides for complementary relief in relation to duties ordinarily payable on transfers of property in the following terms—

42. (1) Stamp Duty under the heading "Conveyance or Transfer on Sale" in the First Schedule to the Stamp Act, 1891, shall not be chargeable on an instrument to which this section applies.

Provided that no such instrument shall be deemed to be duly stamped unless either it is stamped with the duty to which it would but for this section

be liable, or it has in accordance with the provisions of section twelve of the said Act been stamped with a particular stamp denoting either that it is not chargeable with any duty or that it is duly stamped.

(2) This section applies to any instrument as respects which it is shown to the satisfaction of the Commissioners of Inland Revenue—

(a) that the effect thereof is to convey or transfer a beneficial interest in property from one company with limited liability to another such company, and

(b) that either .

(i) one of the companies is beneficial owner of not less than ninety per cent of the issued share capital of the other company, or

(ii) not less than ninety per cent of the issued share capital of each of the companies is in the beneficial ownership of a third company with limited liability

§ 5.—Winding-up.

The existence of a company is normally terminated by winding-up, in the course of which its affairs are liquidated by one or more liquidators.

A company may be wound up voluntarily, or by order of the Court, or subject to the supervision of the Court (§ 156).

In voluntary liquidation the winding-up is carried out by a liquidator usually appointed by the company, but the body of creditors can control the appointment where the liquidation is the result of the inability of the company to discharge its liabilities. The liquidator generally has a free hand in carrying out his duties but is subject to the control of the company and the creditors according to circumstances, and may be required to work under a Committee of Inspection. Application may be made to the Court by interested persons for the determination of matters in dispute.

A liquidation under the supervision of the Court pre-supposes a voluntary liquidation, the supervision order being made after the voluntary winding-up has commenced. The liquidator already appointed is usually continued, though the Court may appoint

another to act with him. The advantage of a supervision order is that it stays actions and distraints, gives directions on specified points, and thus saves continual applications to the Court.

A winding-up order is made by the Court after the presentation of a petition. The liquidator is appointed by the Court on the nomination of separate meetings of creditors and contributories, and is an officer of the Court. The winding-up is entirely under the control of the Court, and is supervised by the Board of Trade and the Official Receiver, and generally also by a committee of inspection.

The object of the liquidation being to wind up the affairs of the company, the liquidator must get in and realise the assets, pay the costs, discharge the debts (*pari passu* if insufficient to pay in full) in their proper order, and distribute any surplus amongst the contributories in accordance with their rights and interests.

Part V of the Act (§§ 156-305) and the rules made thereunder govern the winding-up of companies.*

§ 6.— Removal of Defunct Companies from the Register.

In certain circumstances a company may be removed from the register without being wound up in the usual way.

Where the Registrar has reasonable cause to believe that a company is not carrying on business or in operation, he may send to the company by post a letter inquiring whether the company is carrying on business or in operation.

* For further information on the subject, reference should be made to Ranking, Spicer and Pegler's "The Rights and Duties of Liquidators, Trustees and Receivers" (Wilson).

If he does not within one month of sending the letter receive any answer thereto, he must within fourteen days after the expiration of the month send to the company by post a registered letter referring to the first letter, and stating that no answer thereto has been received, and that if an answer is not received to the second letter within one month from the date thereof, a notice will be published in the *Gazette* with a view to striking the name of the company off the register.

If he either receives an answer to the effect that the company is not carrying on business or in operation, or does not within one month after sending the second letter receive any answer, he may publish in the *Gazette*, and send to the company by post, a notice that at the expiration of three months from the date of that notice the name of the company mentioned therein will, unless cause is shown to the contrary, be struck off the register, and the company will be dissolved.

If, in any case where a company is being wound up, the Registrar has reasonable cause to believe either that no liquidator is acting, or that the affairs of the company are fully wound up, and the returns required to be made by the liquidator have not been made for a period of six consecutive months, the Registrar must publish in the *Gazette* and send to the company or the liquidator, if any, a like notice as is provided in the last preceding subsection.

At the expiration of the time mentioned in the notice the Registrar may, unless cause to the contrary is previously shown by the company, strike its name off the register, and must publish notice thereof in the *Gazette*, and on the publication in the *Gazette* of this

notice the company is dissolved. It is, however, provided that—

- (a) the liability, if any, of every director, managing officer and member of the company shall continue and may be enforced as if the company had not been dissolved ; and
- (b) this does not affect the power of the Court to wind up a company the name of which has been struck off the register.

If a company or any member or creditor thereof feels aggrieved by the company having been struck off the register, the Court on an application made by the company or member or creditor before the expiration of twenty years from the publication in the *Gazette* of the notice aforesaid may, if satisfied that the company was at the time of the striking off carrying on business or in operation, or otherwise that it is just that the company be restored to the register, order the name of the company to be restored to the register, and upon an office copy of the order being delivered to the Registrar for registration the company is deemed to have continued in existence as if its name had not been struck off ; and the Court may by the order give such directions and make such provisions as seem just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off.

A notice to be sent under the above provisions to a liquidator may be addressed to the liquidator at his last known place of business, and a letter or notice to be sent to a company may be addressed to the company at its registered office, or, if no office has been registered, to the care of some director or officer of the company, or, if there is no director or officer

of the company whose name and address are known to the Registrar of Companies, may be sent to each of the persons who subscribed the Memorandum, addressed to him at the address mentioned in the Memorandum (§ 295).

It is not wise to allow a company to become defunct in this way, since the liabilities of its directors, officers and members is continued, and they will remain liable even if the company is afterwards restored to the register (*Brown, Bayley's Steel Works* (1905), 21 T.L.R. 374).

An application for restoration can be made even after the publication of dissolution (*Re Hall & Co.* (1916), 60 S.J. 666).

If the name of a company has been struck off the register under the above section, and a petition to restore is brought by shareholders, the company should be added as co-petitioner in order that the undertakings required by the Board of Trade as to filing the necessary returns may be given (*In re Wright Ltd.* (1923), 67 S.J. 577).

Where a company is dissolved, all property and rights whatsoever vested in or held on trust for the company immediately before its dissolution (including leasehold property but not including property held by the company on trust for any other person) is, subject and without prejudice to any order which may at any time be made by the Court, deemed to be *bonâ vacantia* and accordingly belongs to the Crown, or to the Duchy of Lancaster or to the Duke of Cornwall for the time being, as the case may be, and vests and may be dealt with in the same manner as other *bonâ vacantia* accruing to the Crown, to the Duchy of Lancaster or to the Duke of Cornwall (§ 296).

APPENDIX I.

PENALTIES AND LIABILITIES

which may be incurred by Promoters, Directors and Officers under the Companies Act, 1929:—

Section of the Act	OFFENCE	PENALTY OR LIABILITY
7	Failure to give notice to Registrar of increase in number of members of a Company not having a share capital	£5 a day
23	Failure to forward copy of Memorandum and Articles to a member on request	£1 for each offence
24	Failure to embody alterations in copies of Memorandum subsequently issued	£1 for each copy
27	Failure to deliver to Registrar necessary documents upon an alteration of Articles of a Private Company which makes it a Public Company	£50
31	Failure to deliver copy of Prospectus to Registrar before issue	£5 a day
35	Issue of Form of Application for Shares or Debentures unaccompanied by Prospectus	£500
37	Publication of name of person not a qualified Director	Indemnity to such person
40	Failure to file Statement in lieu of Prospectus	£100
42	Failure to make Return of allotment of shares, or to file contract or particulars thereof, of shares allotted for a consideration other than cash, within one month after allotment	£50 a day
43	Failure to deliver to Registrar particulars of commissions to be disclosed in Statement in lieu of Prospectus where Prospectus not issued	£25
44	Failure to disclose commissions paid and not written off, in the Balance Sheet of the Company	£5 a day
45	For the Company giving financial assistance for purchase of shares in the Company	£100
46	Failure to include in the Balance Sheet particulars of redeemable preference shares	£100
47	Failure to disclose in the Prospectus and Balance Sheet, particulars of discount allowed on issue of shares, or so much as has not been written off	£5 a day
51	Failure to give notice within one month to the Registrar of alteration of share capital by consolidation, conversion, etc.	£5 a day

NOTE Where a penalty is stated, it represents the maximum fixed by the Act

Section of the Act.	OFFENCE.	PENALTY OR LIABILITY.
52	Failure to give notice within 15 days to the Registrar of increase of share capital	£5 a day.
54	Failure to show in the Accounts of the Company, particulars as to interest on shares, paid out of capital	£50.
60	Concealing names of creditors, etc., in connection with a scheme of reduction of capital	Prosecution for Misdemeanour.
61	Failure to forward to Registrar within 15 days, copy of Order of the Court in connection with alteration of rights of shareholders where application to the Court is made by dissentients	£5 a day.
66	Failure to send notice to transferee where Company refuses to register transfer	£5 a day.
67	Failure to issue share or debenture certificates within prescribed time	£5 a day.
73	Refusal to permit inspection of Register of Debenture-holders or failure to supply copies	£5 and £5 a day.
80	Failure to register with Registrar charges on assets of the Company	£50 a day.
81	Failure to register with Registrar charges existing on property acquired	£50.
83	Failure to secure endorsement of certificate of registration on debentures issued	£100.
88	Omission to make proper entries in Company's Register of Charges	£50.
89	Refusal to permit inspection or to supply copies of Company's Register of Charges	£5 and £2 a day.
91	Failure to register with Registrar, charges created, or charges on property acquired by Company before commencement of this Act	£50 a day.
92	Failure to provide a registered office or to notify Registrar of situation thereof or of any change	£5 a day.
93	Failure to exhibit Company's name on place of business	£5.
	Failure to keep name painted or affixed	£5 a day.
	For using seal not bearing the name of the Company, or issuing notices, invoices, etc., not containing the Company's name	£50.
94	Commencing business before compliance with statutory provisions	£50 a day.
95	Failure to keep a Register of Members or to make proper entries therein	£5 a day.
96	Failure to keep an index of members where required	£5 a day.
98	Refusal to permit inspection of the Register of Members, or to supply copies	£2 and £2 a day.
103	Failure to give notice to Registrar of the situation of the office where any Dominion Register of Members is kept	£5 a day.
104	Failure to transmit to registered office copy of entries in Dominion Register, and to keep duplicate of Dominion Register	£5 a day.

Section of the Act	OFFENCE	PENALTY OR LIABILITY.
110	Failure to permit inspection of copy of Annual Return in Register of Members or to supply copies	£2 and £2 a day.
	Failure to prepare and file Annual Return	£5 a day.
112	Failure to hold Annual Meeting	£50.
113	Failure to hold Statutory Meeting or to forward or file Statutory Report	£50
118	Failure to deliver copies of extraordinary special, and certain other resolutions to Registrar	£2 a day
	Failure to attach copies of such resolutions to Articles subsequently issued	£1 per copy.
121	Refusal to permit inspection of Minute Book of General Meetings, or to supply copies	£2 and £2 a day.
122	Failure to keep proper books of Account (Imprisonment only where default is wilful)	6 mos' imprisonment, or fine of £200
123	Failure to take reasonable steps to have prepared and laid before General Meeting a Profit and Loss Account and Balance Sheet (Imprisonment only where default is wilful)	6 mos' imprisonment, or fine of £200
129	Issuing Balance Sheet without copy of Auditors' Report attached	£50
130	Failure to forward copy of Balance Sheet to members prior to general meeting at which it is to be presented	£20
	Failure to supply copies of Balance Sheet to those entitled thereto	£5 a day
131	Failure of Banking Company to publish prescribed return	£5 a day
131) 137)	Refusal of books, &c., to Inspectors	As for Contempt of Court
141	Acting as Director when unqualified (after period of grace)	£5 a day
142	Undischarged bankrupt acting as Director without leave of the Court	2 yrs' imprisonment and/or fine of £500
144	Refusal to permit inspection of Register of Directors, or failure to keep or file with Registrar, a Register of Directors	£5 a day
145	Non disclosure of names etc of Directors in trade catalogues etc where applicable	£5
146	Failure to notify proposed Director where his liability will be unlimited	£100 and damages suffered by person elected
148	Non disclosure of particulars as to remuneration to members in the prescribed circumstances	£50
149	Failure to disclose nature of interest in contracts with the Company	£100
150	Receipt of compensation for loss of office	See Chap X, § 3.

Section of the Act	OFFENCE	PENALTY OR LIABILITY.
153	Failure to deliver to Registrar copy of Order of the Court in a scheme of compromise with members or creditors, or to attach copy to copies of Memorandum subsequently issued	£1 per copy
154	Failure to deliver to Registrar copy of Order of the Court in a scheme to facilitate reconstruction, etc. of the Company	£5 a day
181	Failure to prepare Statement of Affairs where the Company is being wound up compulsorily	£10 a day
217	For acting as a Director of any Company without the leave of the Court within 5 years of a charge of fraud being made against him in a Further Report by the O R	2 yrs imprisonment and/or fine of £500
226	Failure to advertise in the Gazette resolution for voluntary winding up	£5 a day
238	Failure to present a full statement of the Company's position at the first meeting of creditors in a creditors winding up	£100
238	Failure to provide at the above meeting after due appointment	£100
271	For commission of prescribed offences analogous to those under § 114 of the Bankruptcy Act 1914	Prosecution for Misdemeanour
272	Falsification of books	Prosecution for Misdemeanour
273	Inducing persons by fraud or false pretences to give credit to the Company which has subsequently gone into liquidation or making fraudulent conveyances or fraudulently removing or concealing property of the Company	Prosecution for Misdemeanour.
274	Failure to keep proper accounts for the two years preceding the winding up of the Company	One year's imprisonment
275	Carrying on the business of the Company (which is subsequently wound up) with a view to defrauding creditors	One year's imprisonment
	Acting as Director of a Company without leave of the Court within five years after conviction as above	Two years imprisonment and or fine of £500
280	Failure to state on invoices etc. issued by, or on behalf of the Company, that the Company is in liquidation	£20
308	Failure to state on invoices, etc., issued by, or on behalf of the Company, that a Receiver or Manager has been appointed	£20
351	Failure to comply with prescribed requirements as to filing documents, etc. in the case of a foreign Company carrying on business in this Country	£50
	In the case of continuing offences	£5 a day

APPENDIX II.

SPECIMEN,

MEMORANDUM OF ASSOCIATION
OF

LIMITED.

1. The name of the company is
2. The registered office of the company will be situate in England.
3. The objects for which the company is established are :—
 - (a) To apply for, purchase or otherwise acquire any interests in any part of the world in any patents, brevets d'invention, licences, processes, concessions and the like, conferring any exclusive or non-exclusive or limited right to use any secret or other information as to any invention in relation to the treatment of chemicals chemical compounds and other substances of a like nature, and the production, manufacture and use of chemicals and of any apparatus therefor, or generally any invention of a like nature which may seem to the company capable of being profitably dealt with, and in particular to acquire the benefit of certain of existing inventions in relation to the treatment of chemicals and the production of chemical compounds.
 - (b) To use, exercise, develop, grant licences in respect of or otherwise turn to account any such patents, brevets d'invention, licences, concessions, and the like and information aforesaid.
 - (c) To carry on business in any part of the world as manufacturers of, dealers in and agents for the sale of, chemicals of every kind and description.
 - (d) Further to carry on any other business which may seem profitable to the company and capable of being conveniently carried on by it.
 - (e) To equip expeditions and commissions, and to employ and remunerate experts and other agents in connection therewith and with a view to secure any of the objects of the company.
 - (f) To promote or form any company or companies for the purpose of acquiring all or any part of the property and rights and of undertaking any of the liabilities of the company, or of undertaking any business or operations or for any other purpose which may appear likely directly or indirectly to assist or benefit this company, or to acquire and undertake the whole or any part of the business, property and liabilities of other persons or companies by paying or contributing towards the preliminary expenses thereof or providing the whole or part of the capital thereof, or by taking shares therein or by lending money thereto upon debentures or otherwise.
 - (g) To amalgamate or enter into partnership or into any arrangement for sharing profits, unions of interests, joint adventure, reciprocal concession or co-operation with any person or company carrying on or engaged in, or about to carry on or engage in any business or transaction which this company is authorised to carry on or engage in, or any business or transaction capable of being conducted so as directly or indirectly to benefit the company

- (h) Generally to purchase, to take on lease or in exchange, hire or otherwise acquire any real or personal property, and any rights or privileges which the company may think necessary or convenient with reference to any of these objects, or capable of being profitably dealt with in connection with any of the company's property or rights for the time being
- (i) To sell the undertaking of the company or any part thereof for such consideration as the company may think fit and in particular for shares, debentures or securities of any other company having objects altogether or in part similar to those of the company.
- (j) To acquire, carry out, establish, construct, maintain, improve, manage, work, control and superintend any railways or tramways, whether terrestrial or aerial, worked by steam, electricity or other motive power, roads, ways, bridges, harbours, reservoirs, water-courses, canals, waterways, wharves, fortifications, hydraulic works, irrigation works, draining, engineering, mining, dredging, cyaniding, smelting and ore reduction works, furnaces, factories, manufactories, warehouses, hotels, stores, houses, buildings, shops and other works and conveniences, and to contribute to or assist in any such proceedings
- (k) To buy, sell, manufacture, alter, repair, improve, exchange, hire, let on hire, manipulate, treat, prepare for market, export, and generally deal in plant, machinery, apparatus, tools, utensils, commodities, products, materials, merchandise, articles and things whatsoever which may be found convenient in carrying out any of the objects of the company, and generally to carry on business as merchants, importers and exporters
- (l) To purchase, acquire, assist, finance, carry on, conduct and manage any or every of the businesses of bankers, financiers, money changers, company promoters, underwriters, explorers, concessionaires, agents, commissioners, collectors, brokers, dealers, trustees, safe deposit keepers, executors, attorneys, delegates, treasurers, secretaries, engineers, builders, contractors, shipowners, shipbuilders, manufacturers, merchants, millers, tanners, bakers, dealers in firearms and ammunition, wharfingers, warehousemen, gas and electrical engineers, dealers in building materials, licensed victuallers, wine, spirit, tea, coffee, cotton and tobacco merchants and planters, traders, motor carriage and cycle makers, miners, colliery owners, quarry owners, hotel proprietors, restaurant keepers, store keepers, shopkeepers, farmers, ranchmen, stockkeepers, livery stable keepers, horse breeders, and all and every other business of whatsoever nature and kind (except life assurance) in any part of the world
- (m) To invest and deal with the moneys of the company not immediately required upon such securities and in such manner as may from time to time be determined
- (n) To enter into contracts, agreements or arrangements with governments or authorities (supreme, municipal, local or otherwise, or any corporation, companies or persons in any part of the world), and to obtain from any such government or authority all reports, concessions and privileges that may be deemed conducive to the company's objects or any of them
- (o) To raise or borrow, or secure at the discretion of the directors, the payment of money for any purposes of the company in such manner and on such terms as may seem expedient, and in particular at such discretion as aforesaid, by the issue of debentures or debenture stock, perpetual or redeemable mortgages or other

securities, whether perpetual or otherwise, and charged or not charged upon the whole or any part of the property of the company (both present and future), and all or any of the uncalled capital for the time being of the company.

- (p) To obtain any decree, law, provisional order or Act of Parliament for enabling the company to carry any of its objects into effect, or for effecting any modification of the company's constitution, or for any other purpose which may seem conducive, and to oppose any proceedings or applications which may seem calculated directly or indirectly to prejudice the company's interests.
- (q) To make, draw, accept, indorse, discount, execute and issue cheques, credit notes, circular notes, bills of exchange, promissory notes, debentures, bills of lading and other negotiable or transferable instruments or securities.
- (r) To sell, let, improve, manage, develop, lease, mortgage, exchange, enfranchise, surrender, convert, dispose of, turn to account or otherwise deal with all or any part of the property and rights of the company in such manner as the directors may deem fit.
- (s) To expend money in experimenting upon and testing and in improving or securing any process or processes or patent or patents or protecting any invention or inventions which the company may acquire or propose to acquire or deal with.
- (t) To divide or distribute among the members or any class or classes of the members or any individual member of the company, any shares or securities belonging to the company or any of the assets of the company in specie, or any proceeds of sale or disposal of any property of the company, and for such purpose to distinguish and separate capital from profits, but so that no distribution amounting to a reduction of capital be made except with the sanction (if any) for the time being required by law.
- (u) To purchase or otherwise acquire and undertake all or any part of the business, property and liabilities of any person or company carrying on any business in any part of the world which this company is authorised to carry on, or possessed of property suitable for the purposes of the company.
- (v) To establish, erect, construct, purchase, acquire, maintain, improve, work, conduct, manage, control, superintend and carry on any public or private gas, electrical or other lighting, and any waterworks and service, and any steam, gas, electrical, hydraulic, pneumatic, or other power, supply and traction, and any railway, tramway and traffic service, and any telegraphic and telephonic service, and any and every other similar public or private undertakings or services in any part of the world.
- (w) To pay out of the funds of the company, either in cash, fully-paid shares or otherwise, all the costs, charges and expenses of all parties of and incidental to the promotion, formation and registration of the company and of any other company and the issue of its share capital, and generally all preliminary expenses whatever, incurred in relation to the company including registration and stamp fees, legal expenses, printing and advertising and the establishment of agencies of the company, and obtaining the subscription of the shares or debentures thereof, including so far as permissible by law all brokerage, commissions, discounts and other remunerations to any person, firm or company as consideration for subscribing or agreeing to subscribe, whether absolutely or conditionally, or procuring or guaranteeing or

agreeing to procure or guarantee subscriptions, whether absolute or conditional, for or for underwriting, placing, selling or otherwise disposing of any shares, debentures or other securities or property of the company or any other company, or for procuring or obtaining settlement and quotations upon London, Provincial, Foreign or Colonial Stock Exchanges of any of the said shares, debentures or other securities, or for services rendered in and about the matters aforesaid, or in and about the conduct of the company's business or of any other company in which the company may be interested, and to enter into any contract or contracts for any of the purposes hereof

- (z) To transfer to or otherwise cause to be vested in any company person or persons, all or any of the property of the company to be held in trust for the company, or on such trust for working, developing or disposing of the same as may be considered expedient
- (y) To establish and support or aid in the establishment and support of associations, institutions or conveniences calculated to benefit persons employed by the company or having dealings with the company and to subscribe or guarantee money for charitable or benevolent objects or for any exhibition or for any public, general or useful object
- (z) To lend money and issue warrants to such persons and on such terms as may seem expedient, and in particular to customers of and persons having dealings with the company, and to give any guarantee or indemnity that may seem expedient and to receive moneys and valuables on deposit and to transact any part of the business of a banker which may seem expedient
- (aa) To apply for, subscribe to, accept, purchase, acquire, hold sell and exchange any ordinary, preference, deferred or other share and any stock, bond, debenture, mortgage or other security in any company, corporation or government
- (bb) To construct maintain and alter any buildings works, manufactories, docks, aerial railways, machinery, ships and other conveniences, and to take or otherwise acquire and hold shares in any other company altogether or in part similar to those of this company or carrying on any business capable of being conducted directly or indirectly to benefit this company
- (cc) To issue any share of the company at par, or at a premium, or as fully or in part paid up
- (dd) To give the call of shares and to confer any preferential or special right to the allotment of shares on such terms and in such manner as may seem expedient
- (ee) To allot any of the shares of the company credited as fully or partly paid up, or the bonds and debentures of the company, as the whole or part of the purchase price for any property purchased by the company or for any valuable consideration
- (ff) To do all or any of the above things in the United Kingdom or on the Continent, or elsewhere in any part of the world, and either as principals, agents, trustees, contractors or otherwise, and either alone or in conjunction with others, and either by or through agents, sub contractors, trustees or otherwise
- (gg) To establish and maintain agencies of the company in any colony protectorate, or foreign state, and if thought fit to procure the company to be registered or incorporated in any colony, protectorate or foreign state

(A) To promote, institute, enter into, carry on, assist or participate in any and every description of financial, commercial, mercantile, industrial, manufacturing, mining and agency business, works, contracts, undertakings and operations of all kinds at the discretion of the directors.

(ii) To do all such other things as are incidental or conducive to the attainment of the above objects, and so that the word "company" in this clause shall be deemed to include any partnership or other body of persons, whether incorporated or not, and whether domiciled in Great Britain or elsewhere, and the intention is that the objects set forth in the different paragraphs of this clause shall be in no wise limited or restricted by reference to or inference from the terms of any other paragraph of the same clause, or the name of the company.

4. The liability of the members is limited.

5. The nominal capital of the company is £ , divided into shares of £ each. *The company has power from time to time to increase its capital, and re-issue any shares in the original or increased capital, with or subject to such preferred, deferred, qualified or other special rights, privileges, conditions, priorities or restrictions, whether in regard to dividend, voting, return of capital or otherwise, as the company may from time to time by extraordinary resolution determine. Provided always that if and whenever the capital of the company is divided into shares of different classes, the rights and privileges of any such class may be varied with the consent in writing of the holders of three-fourths of the issued shares of that class, or with the sanction of an extraordinary resolution passed at a separate general meeting of the holders of the shares of that class. At every such separate general meeting the quorum shall be two persons at least, holding or representing by proxy one-third of the issued shares of the class.]

We, the several persons whose names and addresses are subscribed, are desirous of being formed into a company in pursuance of this Memorandum of Association, and we respectively agree to take the number of shares in the capital of the company set opposite our respective names:—

NAMES, ADDRESSES AND DESCRIPTIONS OF SUBSCRIBERS.								Number of Shares taken by each Subscriber
A.	..	..	..	..	..	..	..	One.
B	..	..	..	..	..	..	..	One.
C	..	..	..	..	..	..	..	One.
D	..	..	..	..	..	..	..	One.
E	..	..	..	..	..	..	..	One.
F	..	..	..	..	..	..	..	One.
G	..	..	..	..	..	..	..	One.

Witness to the Signatures of the above-named.

(Signature)

(Description)

Dated the _____ day of _____ 19__.

* The words in brackets have been included here as used by many companies. On the whole, however, these provisions are better included in the Articles.

EE

APPENDIX III.

COMPANIES ACT, 1929

TABLE A

REGULATIONS FOR MANAGEMENT OF A COMPANY LIMITED BY SHARES

Preliminary

1 In these regulations—

‘ The Act ’ means the Companies Act, 1929

Where any provision of the Act is referred to, the reference is to that provision as modified by any statute for the time being in force

Unless the context otherwise requires expressions defined in the Act or any statutory modification thereof in force at the date at which these regulations become binding on the company shall have the meanings so defined

Shares.

2 Subject to the provisions, if any, in that behalf of the memorandum of association, and without prejudice to any special rights previously conferred on the holders of existing shares, any share may be issued with such preferred, deferred or other special rights, or such restrictions, whether in regard to dividend, voting, return of share capital or otherwise, as the company may from time to time by special resolution determine, and any preference share may, with the sanction of a special resolution, be issued on the terms that it is, or at the option of the company, is liable to be redeemed

3 If at any time the share capital is divided into different classes of shares, the rights attached to any class (unless otherwise provided by the terms of issue of the shares of that class) may be varied with the consent in writing of the holders of three fourths of the issued shares of that class, or with the sanction of an extraordinary resolution passed at a separate general meeting of the holders of the shares of the class. To every such separate general meeting the provisions of these regulations relating to general meetings shall *mutatis mutandis* apply, but so that the necessary quorum shall be two persons at least holding or representing by proxy one third of the issued shares of the class and that any holder of shares of the class present in person or by proxy, may demand a poll

4 Every person whose name is entered as a member in the register of members shall, without payment, be entitled to a certificate under the seal of the company specifying the share or shares held by him and the amount paid up thereon, provided that in respect of a share or shares held jointly by several persons the company shall not be bound to issue more than one certificate, and delivery of a certificate for a share or one of several joint holders shall be sufficient delivery to all

5. If a share certificate is defaced, lost or destroyed, it may be renewed on payment of such fee, if any, not exceeding 1s., and on such terms, if any, as to evidence and indemnity as the directors think fit.

6. No part of the funds of the company shall directly or indirectly be employed in the purchase of, or in loans upon the security of, the company's shares, but nothing in this regulation shall prohibit transactions mentioned in the proviso to section 45 (1) of the Act.

Lien.

7. The company shall have a lien on every share (not being a fully-paid share) for all moneys (whether presently payable or not) called or payable at a fixed time in respect of that share, and the company shall also have a lien on all shares (other than fully-paid shares) standing registered in the name of a single person, for all moneys presently payable by him or his estate to the company; but the directors may at any time declare any share to be wholly or in part exempt from the provisions of this regulation. The company's lien (if any) on a share shall extend to all dividends payable thereon.

8. The company may sell, in such manner as the directors think fit, any shares on which the company has a lien, but no sale shall be made unless some sum in respect of which the lien exists, is presently payable, nor until the expiration of 14 days after a notice in writing, stating and demanding payment of such part of the amount in respect of which the lien exists as is presently payable, has been given to the registered holder for the time being of the share, or the person entitled thereto by reason of his death or bankruptcy.

9. For giving effect to any such sale the directors may authorise some person to transfer the shares sold to the purchaser thereof. The purchaser shall be registered as the holder of the shares comprised in any such transfer and he shall not be bound to see to the application of the purchase money, nor shall his title to the shares be affected by any irregularity or invalidity in the proceedings in reference to the sale.

10. The proceeds of the sale shall be received by the company and applied in payment of such part of the amount in respect of which the lien exists as is presently payable, and the residue shall (subject to a like lien for sums not presently payable as existed upon the shares prior to the sale) be paid to the person entitled to the shares at the date of the sale.

Calls on Shares.

11. The directors may from time to time make calls upon the members in respect of any moneys unpaid on their shares, provided that no call shall exceed one-fourth of the nominal amount of the share, or be payable at less than one month from the last call; and each member shall (subject to receiving at least 14 days' notice specifying the time or times of payment) pay to the company at the time or times so specified the amount called on his shares.

12. The joint holders of a share shall be jointly and severally liable to pay all calls in respect thereof.

13. If a sum called in respect of a share is not paid before or on the day appointed for payment thereof, the person from whom the sum is due shall pay interest upon the sum at the rate of £5 per centum per annum from the day appointed for the payment thereof to the time of the actual payment, but the directors shall be at liberty to waive payment of that interest wholly or in part.

14. The provisions of these regulations as to the liability of joint holders and as to payment of interest shall apply in the case of nonpayment of any sum which, by the terms of issue of a share, becomes payable at a fixed time, whether on account of the amount of the share, or by way of premium, as if the same had become payable by virtue of a call duly made and notified.

15. The directors may make arrangements on the issue of shares for a difference between the holders in the amount of calls to be paid and in the times of payment

16. The directors may, if they think fit, receive from any member willing to advance the same all or any part of the moneys uncalled and unpaid upon any shares held by him, and upon all or any of the moneys so advanced may (until the same would but for such advance become presently payable) pay interest at such rate (not exceeding, without the sanction of the company in general meeting six per cent) as may be agreed upon between the member paying the sum in advance and the directors

Transfer and Transmission of Shares

17. The instrument of transfer of any share shall be executed by or on behalf of the transferor and transferee, and the transferor shall be deemed to remain a holder of the share until the name of the transferee is entered in the register of members in respect thereof

18. Shares shall be transferred in the following form, or in any usual or common form which the directors shall approve

I *A B*, of in consideration of the sum of £ paid to me by *C D*, of (hereinafter called "the said transferee"), do hereby transfer to the said transferee the share (or shares) numbered in the undertaking called the Company Limited, to hold unto the said transferee, subject to the several conditions on which I held the same and I, the said transferee do hereby agree to take the said share (or shares) subject to the conditions aforesaid
As witnesses our hands the day of
Witness to the signatures of, &c

19. The directors may decline to register any transfer of shares not being fully paid shares, to a person of whom they do not approve, and may also decline to register any transfer of shares on which the company has a lien. The directors may also suspend the registration of transfers during the 14 days immediately preceding the ordinary general meeting in each year. The directors may decline to recognise any instrument of transfer unless—

- (a) a fee not exceeding 2s. 6d. is paid to the company in respect thereof, and
- (b) the instrument of transfer is accompanied by the certificate of the shares to which it relates, and such other evidence as the directors may reasonably require to show the right of the transferor to make the transfer

If the directors refuse to register a transfer of any shares, they shall within two months after the date on which the transfer was lodged with the company send to the transferee notice of the refusal

20. The legal personal representatives of a deceased sole holder of a share shall be the only persons recognised by the company as having any title to the share. In the case of a share registered in the names of two or more holders, the survivors or survivor, or the legal personal representatives of the deceased survivor, shall be the only persons recognised by the company as having any title to the share

21. Any person becoming entitled to a share in consequence of the death or bankruptcy of a member shall upon such evidence being produced as may from time to time be required by the directors, have the right, either to be registered as a member in respect of the share or, instead of being registered himself, to make such transfer of the share as the deceased or bankrupt person could have made, but the directors shall, in either case, have the same right to decline or suspend registration as they would have had in the case of a transfer of the share by the deceased or bankrupt person before the death or bankruptcy

22 A person becoming entitled to a share by reason of the death or bankruptcy of the holder shall be entitled to the same dividends and other advantages to which he would be entitled if he were the registered holder of the share, except that he shall not, before being registered as a member in respect of the share, be entitled in respect of it to exercise any right conferred by membership in relation to meetings of the Company

Forfeiture of Shares.

23 If a member fails to pay any call or instalment of a call on the day appointed for payment thereof, the directors may, at any time thereafter during such time as any part of such call or instalment remains unpaid, serve a notice on him requiring payment of so much of the call or instalment as is unpaid, together with any interest which may have accrued.

24 The notice shall name a further day (not earlier than the expiration of 14 days from the date of the notice) on or before which the payment required by the notice is to be made, and shall state that in the event of nonpayment at or before the time appointed the shares in respect of which the call was made will be liable to be forfeited

25 If the requirements of any such notice as aforesaid are not complied with, any share in respect of which the notice has been given may at any time thereafter, before the payment required by the notice has been made, be forfeited by a resolution of the directors to that effect

26 A forfeited share may be sold or otherwise disposed of on such terms and in such manner as the directors think fit, and at any time before a sale or disposition the forfeiture may be cancelled on such terms as the directors think fit

27 A person whose shares have been forfeited shall cease to be a member in respect of the forfeited shares, but shall, notwithstanding, remain liable to pay to the company all moneys which, at the date of forfeiture, were presently payable by him to the company in respect of the shares, but his liability shall cease if and when the company receive payment in full of the nominal amount of the shares

28 A statutory declaration in writing that the declarant is a director of the Company, and that a share in the Company has been duly forfeited on a date stated in the declaration, shall be conclusive evidence of the facts therein stated as against all persons claiming to be entitled to the share. The Company may receive the consideration, if any, given for the share on any sale or disposition thereof and may execute a transfer of the share in favour of the person to whom the share is sold or disposed of and he shall thereupon be registered as the holder of the share, and shall not be bound to see to the application of the purchase money (if any) nor shall his title to the share be affected by any irregularity or invalidity in the proceedings in reference to the forfeiture, sale, or disposal of the share

29 The provisions of these regulations as to forfeiture shall apply in the case of non payment of any sum which, by the terms of issue of a share, becomes payable at a fixed time, whether on account of the amount of the share, or by way of premium, as if the same had been payable by virtue of a call duly made and notified

Conversion of Shares into Stock

30 The company may by ordinary resolution convert any paid up shares into stock, and reconvert any stock into paid-up shares of any denomination.

31. The holders of stock may transfer the same, or any part thereof, in the same manner and subject to the same regulations, as, and subject to which, the shares from which the stock arose might previously to conversion have been transferred, or as near thereto as circumstances admit ;

but the directors may from time to time fix the minimum amount of stock transferable, and restrict or forbid the transfer of fractions of that minimum, but the minimum shall not exceed the nominal amount of the shares from which the stock arose

32 The holders of stock shall, according to the amount of the stock held by them, have the same rights, privileges, and advantages as regards dividends, voting at meetings of the company, and other matters as if they held the shares from which the stock arose, but no such privilege or advantage (except participation in the dividends and profits of the company) shall be conferred by any such aliquot part of stock as would not, if existing in shares, have conferred that privilege or advantage

33 Such of the regulations of the Company as are applicable to paid up shares shall apply to stock and the words "share" and "shareholder" therein shall include "stock" and "stockholder"

Alteration of Capital

34 The company may from time to time by ordinary resolution increase the share capital by such sum, to be divided into shares of such amount, as the resolution shall prescribe

35 Subject to any direction to the contrary that may be given by the company in general meeting all new shares shall, before issue be offered to such persons as at the date of the offer are entitled to receive notices from the company of general meetings in proportion as nearly as the circumstances admit, to the amount of the existing shares to which they are entitled. The offer shall be made by notice specifying the number of shares offered, and limiting a time within which the offer if not accepted will be deemed to be declined and after the expiration of that time, or on the receipt of an intimation from the person to whom the offer is made that he declines to accept the shares offered the directors may dispose of those shares in such manner as they think most beneficial to the company. The directors may likewise so dispose of any new shares which (by reason of the ratio which the new shares bear to shares held by persons entitled to an offer of new shares) cannot in the opinion of the directors be conveniently offered under this article

36 The new shares shall be subject to the same provisions with reference to the payment of calls, lien, transfer transmission, forfeiture and otherwise as the shares in the original share capital

37 The company may, by ordinary resolution

- (a) Consolidate and divide all or any of its share capital into shares of larger amount than its existing shares
- (b) Subdivide its existing shares, or any of them into shares of smaller amount than is fixed by the memorandum of association, subject nevertheless, to the provisions of section 50 (1) (d) of the Act
- (c) Cancel any shares which, at the date of the passing of the resolution, have not been taken or agreed to be taken by any person.

38 The company may by special resolution reduce its share capital and any capital redemption reserve fund in any manner and with and subject to, any incident authorised, and consent required, by law

General Meetings

39 A general meeting shall be held once in every calendar year at such time (not being more than 15 months after the holding of the last preceding general meeting) and place as may be prescribed by the company in general meeting, or, in default, at such time in the third month following that in which the anniversary of the company's incorporation occurs, and at such

place, as the directors shall appoint. In default of a general meeting being so held, a general meeting shall be held in the month next following, and may be convened by any two members in the same manner as nearly as possible as that in which meetings are to be convened by the directors.

40 The above mentioned general meetings shall be called ordinary general meetings, all other general meetings shall be called extraordinary general meetings.

41 The directors may whenever they think fit, convene an extraordinary general meeting, and extraordinary general meetings shall also be convened on such requisition, or, in default, may be convened by such requisitionists, as provided by section 86 of the Companies (Consolidation) Act, 1908 as amended by section 114 of the Act. If at any time there are not within the United Kingdom sufficient directors capable of acting to form a quorum any director or any two members of the company may convene an extraordinary general meeting in the same manner as nearly as possible as that in which meetings may be convened by the directors.

Notice of General Meetings.

42 Subject to the provisions of section 117 (2) of the Act, relating to special resolutions, seven days' notice at the least (exclusive of the day on which the notice is served or deemed to be served, but inclusive of the day for which notice is given) specifying the place, the day, and the hour of meeting, and, in case of special business, the general nature of that business shall be given in manner hereinafter mentioned, or in such other manner, if any, as may be prescribed by the company in general meeting, to such persons as are, under the regulations of the company, entitled to receive such notices from the company: but with consent of all the members entitled to receive notice of some particular meeting, that meeting may be convened by such shorter notice and in such manner as those members may think fit.

43 The accidental omission to give notice of a meeting to, or the non-receipt of notice of a meeting by, any member shall not invalidate the proceedings at any meeting.

Proceedings at General Meeting

44 All business shall be deemed special that is transacted at an extraordinary meeting, and all that is transacted at an ordinary meeting, with the exception of sanctioning a dividend, the consideration of the accounts, balance sheets and the ordinary report of the directors and auditors, the election of directors and other officers in the place of those retiring by rotation, and the fixing of the remuneration of the auditors.

45 No business shall be transacted at any general meeting unless a quorum of members is present at the time when the meeting proceeds to business, save as herein otherwise provided, three members personally present shall be a quorum.

46 If within half an hour from the time appointed for the meeting a quorum is not present the meeting, if convened upon the requisition of members, shall be dissolved, in any other case it shall stand adjourned to the same day in the next week, at the same time and place, and if at the adjourned meeting a quorum is not present within half an hour from the time appointed for the meeting the members present shall be a quorum.

47 The chairman, if any, of the board of directors shall preside as chairman at every general meeting of the company.

48 If there is no such chairman, or if at any meeting he is not present within 15 minutes after the time appointed for holding the meeting, or is unwilling to act as chairman, the members present shall choose some one of their number to be chairman.

49 The chairman may, with the consent of any meeting at which a quorum is present (and shall if so directed by the meeting) adjourn the meeting from time to time and from place to place, but no business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place. When a meeting is adjourned for ten days or more, notice of the adjourned meeting shall be given as in the case of an original meeting. Save as aforesaid it shall not be necessary to give any notice of an adjournment or of the business to be transacted at an adjourned meeting.

50 At any general meeting a resolution put to the vote of the meeting shall be decided on a show of hands, unless a poll is (before or on the declaration of the result of the show of hands) demanded by at least three members, present in person or by proxy entitled to vote or by one member or two members so present and entitled, if that member or those two members together hold not less than 15 per cent of the paid up capital of the company, and, unless a poll is so demanded, a declaration by the chairman that a resolution has, on a show of hands, been carried or carried unanimously, or by a particular majority, or lost, and an entry to that effect in the book of the proceedings of the company shall be conclusive evidence of the fact, without proof of the number or proportion of the votes recorded in favour of, or against, that resolution.

51 If a poll is duly demanded it shall be taken in such manner as the chairman directs, and the result of the poll shall be deemed to be the resolution of the meeting at which the poll was demanded.

52 In the case of an equality of votes, whether on a show of hands or on a poll the chairman of the meeting at which the show of hands takes place or at which the poll is demanded shall be entitled to a second or casting vote.

53 A poll demanded on the election of a chairman or on a question of adjournment, shall be taken forthwith. A poll demanded on any other question shall be taken at such time as the chairman of the meeting directs.

Votes of Members.

54 On a show of hands every member present in person shall have one vote. On a poll every member shall have one vote for each share of which he is the holder.

55 In the case of joint holders the vote of the senior who tenders a vote whether in person or by proxy shall be accepted to the exclusion of the votes of the other joint holders and for this purpose seniority shall be determined by the order in which the names stand in the register of members.

56 A member of unsound mind or in respect of whom an order has been made by any court having jurisdiction in lunacy, may vote whether on a show of hands or on a poll, by his committee, *curator bonis* or other person in the nature of a committee or *curator bonis* appointed by that court, and any such committee, *curator bonis*, or other person may on a poll vote by proxy.

57 No member shall be entitled to vote at any general meeting unless all calls or other sums presently payable by him in respect of shares in the company have been paid.

58 On a poll votes may be given either personally or by proxy.

59 The instrument appointing a proxy shall be in writing under the hand of the appointor or of his attorney duly authorised in writing or if the appointor is a corporation either under the common seal, or under the hand of an officer or attorney duly authorised. A proxy need not be a member of the company.

60 The instrument appointing a proxy and the power of attorney or other authority, if any, under which it is signed or a notarially certified copy of that power or authority shall be deposited at the registered office of the

company not less than 48 hours before the time for holding the meeting or adjourned meeting at which the person named in the instrument proposes to vote, and in default the instrument of proxy shall not be treated as valid.

61. An instrument appointing a proxy may be in the following form or in any other form which the directors shall approve :—

Company, Limited,

" I, _____ of _____, in the county
 " of _____, being a member of the _____ Company,
 " Limited, hereby appoint _____, of _____, as
 " my proxy to vote for me and on my behalf at the [ordinary or extra-
 " ordinary, as the case may be] general meeting of the company to be held
 " on _____ day of _____ and at any adjournment thereof.
 " Signed this _____ day of _____."

62. The instrument appointing a proxy shall be deemed to confer authority to demand or join in demanding a poll

Corporations acting by Representatives at Meetings.

63. Any corporation which is a member of the company may by resolution of its directors or other governing body authorise such person as it thinks fit to act as its representative at any meeting of the company or of any class of members of the company, and the person so authorised shall be entitled to exercise the same powers on behalf of the corporation which he represents as that corporation could exercise if it were an individual member of the company.

Directors.

64. The number of the directors and the names of the first directors shall be determined in writing by a majority of the subscribers of the memorandum of association.

65. The remuneration of the directors shall from time to time be determined by the company in general meeting.

66. The qualification of a director shall be the holding of at least one share in the Company

Powers and Duties of Directors

67. The business of the company shall be managed by the directors, who may pay all expenses incurred in getting up and registering the company, and may exercise all such powers of the company as are not, by the Act, or by these articles, required to be exercised by the company in general meeting, subject nevertheless to any regulation of these articles, to the provisions of the Act, and to such regulations, being not inconsistent with the aforesaid regulations or provisions, as may be prescribed by the company in general meeting; but no regulation made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if that regulation had not been made.

68. The directors may from time to time appoint one or more of their body to the office of managing director or manager for such term, and at such remuneration (whether by way of salary, or commission, or participation in profits, or partly in one way and partly in another) as they may think fit, and a director so appointed shall not, while holding that office, be subject to retirement by rotation, or taken into account in determining the rotation of retirement of directors; but his appointment shall be subject to determination *ipso facto* if he ceases from any cause to be a director, or if the company in general meeting resolve that his tenure of the office of managing director or manager be determined.

69. The amount for the time being remaining undischarged of moneys borrowed or raised by the directors for the purposes of the company (otherwise than by the issue of share capital) shall not at any time exceed the issued share capital of the company without the sanction of the company in general meeting.

70. The directors shall cause minutes to be made in books provided for the purpose—

- (a) of all appointments of officers made by the directors ;
 - (b) of the names of the directors present at each meeting of the directors and of any committee of the directors ;
 - (c) of all resolutions and proceedings at all meetings of the company and of the directors, and of committees of directors.
- and every director present at any meeting of directors or committee of directors shall sign his name in a book to be kept for that purpose.

The Seal.

71. The seal of the company shall not be affixed to any instrument except by the authority of a resolution of the board of directors, and in the presence of a director and of the secretary or such other person as the directors may appoint for the purpose ; and the director and secretary or other person as aforesaid shall sign every instrument to which the seal of the company is so affixed in their presence.

Disqualification of Directors.

72. The office of director shall be vacated if the director—

- (a) ceases to be a director by virtue of section 141 of the Act ; or
- (b) without the consent of the company in general meeting holds any other office of profit under the company except that of managing director or manager ; or
- (c) becomes bankrupt ; or
- (d) becomes prohibited from being a director by reason of any order made under sections 217 or 275 of the Act ; or
- (e) is found lunatic or becomes of unsound mind ; or
- (f) resigns his office by notice in writing to the company ; or
- (g) is directly or indirectly interested in any contract with the company or participates in the profits of any contract with the company.

Provided, however, that a director shall not vacate his office by reason of his being a member of any corporation which has entered into contracts with or done any work for the company if he shall have declared the nature of his interest in manner required by section 149 of the Act, but the director shall not vote in respect of any such contract or work, or any matter arising thereout and if he does so vote his vote shall not be counted.

Rotation of Directors.

73. At the first ordinary general meeting of the company the whole of the directors shall retire from office, and at the ordinary general meeting in every subsequent year one-third of the directors for the time being, or, if their number is not three or a multiple of three, then the number nearest one-third shall retire from office.

74. The directors to retire in every year shall be those who have been longest in office since their last election, but as between persons who became directors on the same day those to retire shall (unless they otherwise agree among themselves) be determined by lot.

75. A retiring director shall be eligible for re-election.

76 The company at the general meeting at which a director retires in manner aforesaid may fill up the vacated office by electing a person thereto and in default the retiring director shall be deemed to have been re-elected unless at such meeting it is resolved not to fill up such vacated office

77 The company may from time to time in general meeting increase or reduce the number of directors, and may also determine in what rotation the increased or reduced number is to go out of office

78 Any casual vacancy occurring in the board of directors may be filled up by the directors, but the person so chosen shall be subject to retirement at the same time as if he had become a director on the day on which the director in whose place he is appointed was last elected a director

79 The directors shall have power at any time, and from time to time, to appoint a person as an additional director, who shall retire from office at the next following ordinary general meeting but shall be eligible for election by the company at that meeting as an additional director

80 The company may by extraordinary resolution remove any director before the expiration of his period of office, and may by an ordinary resolution appoint another person in his stead, the person so appointed shall be subject to retirement at the same time as if he had become a director on the day on which the director in whose place he is appointed was last elected a director

Proceedings of Directors

81 The directors may meet together for the despatch of business, adjourn, and otherwise regulate their meetings, as they think fit Questions arising at any meeting shall be decided by a majority of votes In case of an equality of votes the chairman shall have a second or casting vote A director may and the secretary on the requisition of a director shall, at any time summon a meeting of the directors

82 The quorum necessary for the transaction of the business of the directors may be fixed by the directors, and unless so fixed shall when the number of directors exceeds three be three and when the number of directors does not exceed three be two

83 The continuing directors may act notwithstanding any vacancy in their body, but, if and so long as their number is reduced below the number fixed by or pursuant to the regulations of the company as the necessary quorum of directors the continuing directors may act for the purpose of increasing the number of directors to that number, or of summoning a general meeting of the company, but for no other purpose

84 The directors may elect a chairman of their meetings and determine the period for which he is to hold office but if no such chairman is elected, or if at any meeting the chairman is not present within five minutes after the time appointed for holding the same the directors present may choose one of their number to be chairman of the meeting

85 The directors may delegate any of their powers to committees consisting of such number or members of their body as they think fit, any committee so formed shall in the exercise of the powers so delegated conform to any regulations that may be imposed on it by the directors

86 A committee may elect a chairman of its meetings if no such chairman is elected, or if at any meeting the chairman is not present within five minutes after the time appointed for holding the same, the members present may choose one of their number to be chairman of the meeting

87 A committee may meet and adjourn as it thinks proper Questions arising at any meeting shall be determined by a majority of votes of the members present, and in case of an equality of votes the chairman shall have a second or casting vote

88 All acts done by any meeting of the directors or of a committee of directors, or by any person acting as a director, shall, notwithstanding that it be afterwards discovered that there was some defect in the appointment of any such director or person acting as aforesaid, or that they or any of them were disqualified, be as valid as if every such person had been duly appointed and was qualified to be a director

Dividends and Reserve

89 The company in general meeting may declare dividends, but no dividend shall exceed the amount recommended by the directors

90 The directors may from time to time pay to the members such in term dividends as appear to the directors to be justified by the profits of the company

91 No dividend shall be paid otherwise than out of profits.

92 Subject to the rights of persons, if any entitled to shares with special rights as to dividends, all dividends shall be declared and paid according to the amounts paid on the shares, but if and so long as nothing is paid up on any of the shares in the company dividends may be declared and paid according to the amounts of the shares. No amount paid on a share in advance of calls shall, while carrying interest, be treated for the purposes of this article as paid on the share

93 The directors may, before recommending any dividend, set aside out of the profits of the company such sums as they think proper as a reserve or reserves which shall at the discretion of the directors, be applicable for meeting contingencies or for equalising dividends, or for any other purpose to which the profits of the company may be properly applied and pending such application may, at the like discretion either be employed in the business of the company or be invested in such investments (other than shares of the company) as the directors may from time to time think fit

94 If several persons are registered as joint holders of any share any one of them may give effectual receipts for any dividend or other moneys payable on or in respect of the share

95 Any dividend may be paid by cheque or warrant sent through the post to the registered address of the member or person entitled thereto or in the case of joint holders to any one of such joint holders at his registered address or to such person and to such address as the member or person entitled or such joint holders as the case may be may direct. Every such cheque or warrant shall be made payable to the order of the person to whom it is sent or to the order of such other person as the member or person entitled or such joint holders, as the case may be, may direct

96 No dividend shall bear interest against the company

Accounts

97 The directors shall cause proper books of account to be kept with respect to

All sums of money received and expended by the company and the matters in respect of which the receipt and expenditure takes place, and

All sales and purchases of goods by the company and

The assets and liabilities of the Company

98 The books of account shall be kept at the registered office of the company, or at such other place or places as the directors think fit, and shall always be open to the inspection of the directors

99 The directors shall from time to time determine whether and to what extent and at what times and places and under what conditions or

regulations the accounts and books of the company or any of them shall be open to the inspection of members not being directors, and no member (not being a director) shall have any right of inspecting any account or book or document of the company except as conferred by statute or authorised by the directors or by the company in general meeting

100 The directors shall from time to time in accordance with section 123 of the Act, cause to be prepared and to be laid before the company in general meeting, such profit and loss accounts, balance sheets and reports as are referred to in that section

101 A copy of every balance sheet (including every document required by law to be annexed thereto) which is to be laid before the company in general meeting together with a copy of the Auditors' report shall not less than seven days before the date of the meeting be sent to all persons entitled to receive notices of general meetings of the company

Audit

102 Auditors shall be appointed and their duties regulated in accordance with sections 132, 133 and 134 of the Act

Notices

103 A notice may be given by the company to any member either personally or by sending it by post to him to his registered address or (if he has no registered address in the United Kingdom) to the address, if any, within the United Kingdom, supplied by him to the company for the giving of notices to him

Where a notice is sent by post service of the notice shall be deemed to be effected by properly addressing, prepaying, and posting a letter containing the notice, and to have been effected in the case of a notice of a meeting at the expiration of 24 hours after the letter containing the same is posted, and in any other case at the time at which the letter would be delivered in the ordinary course of post

104 If a member has no registered address within the United Kingdom, and has not supplied to the company an address within the United Kingdom for the giving of notices to him, a notice addressed to him and advertised in a newspaper circulating in the neighbourhood of the registered office of the company shall be deemed to be duly given to him at noon on the day on which the advertisement appears

105 A notice may be given by the company to the joint holders of a share by giving the notice to the joint holder named first in the register of members in respect of the share

106 A notice may be given by the company to the persons entitled to a share in consequence of the death or bankruptcy of a member by sending it through the post in a prepaid letter addressed to them by name, or by the title of representatives of the deceased, or trustee of the bankrupt, or by any like description at the address, if any, within the United Kingdom supplied for the purpose by the persons claiming to be so entitled, or (until such an address has been so supplied) by giving the notice in any manner in which the same might have been given if the death or bankruptcy had not occurred

107 Notice of every general meeting shall be given in some manner hereinbefore authorised to (a) every member except those members who (having no registered address within the United Kingdom) have not supplied to the company an address within the United Kingdom for the giving of notices to them, and also to (b) every person entitled to a share in consequence of the death or bankruptcy, of a member who, but for his death or bankruptcy, would be entitled to receive notice of the meeting No other persons shall be entitled to receive notices of general meetings

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